SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 877.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

W. R. CRESS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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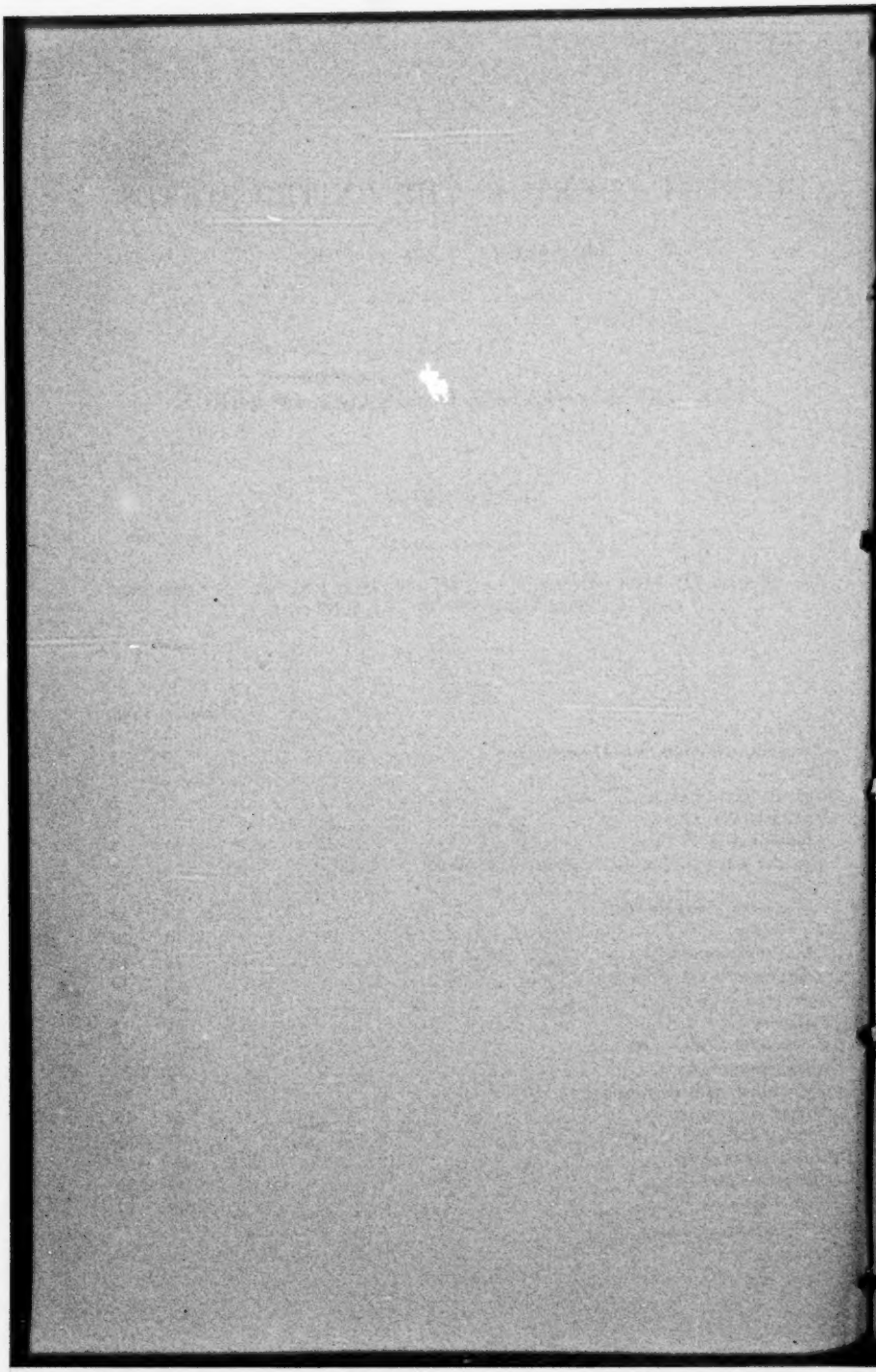

1 Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at the Federal court hall in the city of Covington, Kentucky, on Monday, April 6th, A. D. 1914, and of our Independence the 138th year.

Court met.

Present. Hon. A. M. J. Cochran, judge.

W. R. CRESS, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } 2875.

Transcript of orders.

(From London—Filed Sept. 15, 1913.)

Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at the Federal court hall in the city of London on Monday, May 12, A. D. 1913, and of our Independence the 137th year.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT.

Transcript of orders.

2 Be it remembered that heretofore, to wit, on November 29th, A. D., 1912, an order was made and entered herein, being in words and figures as follows, to wit:

Order.

By agreement of parties this cause is continued generally.

And on a day following, to wit, on April 23, A. D. 1913, an order was made and entered herein being in words and figures as follows, to wit:

Order.

Upon motion of the defendant, the United States, it is ordered that the defendant will be and is hereby granted thirty days additional time in which to file answer herein.

And on a day following, to wit, on May 16, A. D. 1913, an order was made and entered herein, being in words and figures as follows, to wit:

Order.

Come the plaintiff, by attorney and on his motion, the court being advised this cause is continued generally for preparation.

And on a day following, to wit, on June 27, A. D. 1913, an order was made and entered herein being in words and figures as follows, to wit:

Order.

This day come E. P. Morrow, U. S. attorney, and presented and offered for filing an answer herein, and the court being advised, it is now ordered that said answer be and it is hereby filed and noted of record.

3 And on a day following, to wit, on September 10, A. D. 1913, an order was made and entered herein, being in words and figures as follows, to wit:

Order.

By agreement of the plaintiff and the defendant herein this action was directed to be transferred from the United States court, London, Kentucky, to the United States court at Covington, Kentucky, where the same will stand for trial.

Certificate.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, clerk of the United States District Court for the Eastern District of Kentucky, at London, Kentucky, do hereby certify that the foregoing is a true and correct copy of all orders made and entered herein in the matter set out in the caption hereto as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at London, Kentucky, this 10th day of September, A. D. 1913, and of our independence the 138th year.

[SEAL.]

J. W. MENZIES, *Clerk.*
By S. W. STACEY, *D. C.*

4 *Petition.*

(Filed November 1, 1912.)

In the United States District Court for the Eastern District of Kentucky, sitting at London, Kentucky.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANTS.

The plaintiff, W. R. Cress, states that he is now and has been for more than twenty years a citizen and resident of Wayne County, State of Kentucky, in the eastern district thereof.

Plaintiff says that he is now and has been and was at all the dates hereinafter mentioned the owner seized in fee simple and in the actual possession of a certain boundary or tract of land situated in Wayne County, Kentucky, on the waters of Whiteoak Creek and the Cumberland River, lying on the north side of said Cumberland River and principally on the west side of said Whiteoak Creek, adjoining the lands of Hiram Taylor's heirs on the north, the lands of I. S. Brown and Y. W. Burton on the east, the lands of W. W. Burton on the south, and of Y. W. Burton and Hiram Taylor's heirs on the west, containing one hundred and eighty-nine acres.

Plaintiff says that said farm of 189 acres consists of about twelve acres of bottom land, of which about 7 acres is first or lower bottom and five acres second or upper bottom, and that the remainder of said farm outside of the creek or river bluff is what is known as upland and is likewise good for farming and grazing purposes.

5 Plaintiff says that between the years 1908 and 1911, inclusive, the defendant, the United States of America, its officers, agents, servants, and employees, built and constructed a lock and dam upon and across said Cumberland River in the county of Wayne, at a point known as Gann's Island, and known as Lock Number Twenty-one, and being some twelve or fifteen miles below plaintiff's said farm, and so built and constructed said Lock and Dam Number Twenty-one in such manner and to such a height that the waters of said river were thereby obstructed and impeded in their natural flow and were dammed up and held back to such an extent as to raise the natural level of said water at the mouth of said Whiteoak Creek and along the bank thereof adjoining and through plaintiff's farm to the height of about fifteen feet, when said dam was completed and filled with water, to wit, in October, 1911.

Plaintiff says that since the completion of said lock and dam the said defendant, its officers, agents, servants, and employees have continuously maintained and operated same, and will perpetually hereafter so continue to operate and maintain said lock and dam.

Plaintiff further says that the effects of the construction, operation, and maintenance of said lock and dam as above set out has been since its completion in October, 1911, and will forever hereafter be, to form a pool of still or slack water above same extending up said river and into said Whiteoak Creek and into and upon this plaintiff's land, and that said pool so formed obstructs

6 and impedes the waters of said Whiteoak Creek in their natural flow and forces same out of the natural banks and channel of said creek and causes the waters of said river and creek so obstructed and impeded, held back, and dammed up to flow out of said banks and upon and over the lands of plaintiff to such an extent that at the usual and ordinary stage of water in said pool that about seven acres of plaintiff's said bottom land is thereby covered with water, destroyed, and made worthless, and that when

the usual and ordinary hard rains occurring during the winter and spring months and during the cropping seasons come, as they will and do each year, the waters thereof and the tides and freshets thereby formed in said creek and said river have been solely by reason of the construction, operation, and maintenance of said lock and dam and the pool of still or slack water thereby formed continuously caused to spread out and overflow and stand and remain upon and seep through plaintiff's said land to such an extent that all of said seven acres heretofore mentioned and about three acres additional of plaintiff's land will be forever hereafter destroyed, damaged, rendered wet, sloppy, and boggy, and unfit for cultivation and made worthless therefor, making a total of ten acres so injured and destroyed and rendered worthless, which said ten acres is, and has always been, by far the best and most valuable portion of said farm; that the same is, and has always been, extremely valuable, rich, fertile, and productive.

Plaintiff says that the backwater formed in said creek at
7 pool stage covers a considerable portion of his said land and that only a slight rise or tide of from one to three feet will cause the overflow of said bottoms to the amount of seven acres as aforesaid, and that rise of from seven to ten feet will throw or cause the water to flow over the whole of the ten acres aforesaid, thereby rendering the whole of the said ten acres uncertain and unfit for cultivation, much of the same, to wit, about seven acres, being wet, boggy, and unfit for cultivation at all, and, as plaintiff believes, will never be fit for cultivation any more, and plaintiff says by reason of the damming up and obstructing the said river, as hereinbefore stated, he has been injured and damaged in the behalves herein mentioned in the sum of $1,100.00.

Paragraph two.

Plaintiff further states that the home or residence upon said farm is located upon the hill land west of the bottom land hereinbefore described and in the west side of said creek; and that he owns and the farm owned by this plaintiff has always been used and enjoyed a private passway leading from said farm residence down through said bottom lands and across said Whiteoak Creek and on through the lands of I. S. Brown to the public road, at and near the steamboat landing at Mills Springs, Kentucky, a place at which a public ferry is kept, and the nearest and most convenient route to market, post office, and the courthouse at Monticello, Kentucky, and which said wharf and steamboat landing could be reached from said farm residence over the said private passway at a distance of not
8 exceeding a mile and a quarter, and *and* he now says that by reason of the construction of the lock and dam aforesaid the water has been backed up and forced into Whiteoak Creek at such a great depth as to render the same impassable and that it cannot be

forded at pool water, and at the lowest stage thereof, either on horseback or any other way, thereby completely destroying the easement that had always belonged to said farm, to wit, the private passway aforesaid.

Plaintiff further says that by reason of the destruction of his said private passway it has rendered necessary and it is the only way for this plaintiff to reach Mill Springs to travel a distance of between five and six miles and over a rough road, and has so hemmed in the balance of said farm by shutting off the passway aforesaid as to injure and damage the sale thereof in the further sum of one thousand dollars.

Plaintiff further says that no proceedings have ever been instituted to condemn his land hereinbefore described or any part thereof for public use, or for any purpose, and that this plaintiff has never received any compensation from said defendant, the United States of America, or anyone else for the injuries herein complained of, or any part thereof; and that by the said acts of the said defendant, its agents, servants, officers, and employees hereinabove set out this plaintiff has been damaged in the sum of $2,100.

Wherefore the plaintiff prays judgment upon the facts and law of this case and prays that he recover of the defendant, the
9 United States of America, the sum of $2,100.00, and for such further orders, judgments, and decrees as may be necessary in the premises, for his costs herein expended and for all other further, necessary, and proper relief.

W. R. CRESS,
By CRESS & SON, *Attys.*

The affiant, W. R. Cress, says that the statements contained in the foregoing petition are true, as he verily believes.

W. R. CRESS.

Subscribed and sworn to before me by W. R. Cress this October 17th, 1912.

H. C. CRESS,
Notary Public, Wayne County, Kentucky.

Summons and return.

(Filed November 8th, 1912.)

The President of the United States of America; to the Marshal of the Eastern District of Kentucky, greeting:

You are commanded to summon the United States of America, to answer on the first day of the next November term of the District Court of the United States for the Eastern District of Kentucky, to be held at the city of London, a petition filed against it in said court by W. R. Cress, and warn it that upon its failure to answer the peti-

tion will be taken for confessed or it will be proceeded against for contempt; and you will make due return of this summons on the first day of the next November term of said court.

10 Witness, Hon. A. M. J. Cochran, Esq., judge of the District Court of the United States at London, in the said district, this 1st day of November, in the year of our Lord 1912, and of our independence the 137th year.

J. W. MENZIES, *C. D. C. E. D. of Ky.*,
By GEO. C. MOORE, *D. C.*

(Endorsed:) Received Covington, Kentucky, November 2nd, 1912. Executed November 4th, 1912, by handing a copy to Edwin P. Morrow, U. S. district attorney eastern district of Kentucky.

A. B. PATRICK, *U. S. M.*,
By SAM S. SHEPHERD, *Deputy.*

Fees, $2.00.

Summons and return.

(Filed Feb. 8th, 1913.)

The President of the United States of America; to the Marshal of the Eastern District of Kentucky, greeting:

You are commanded to summon the United States of America, to answer on the first day of the next May term of the District Court of the United States for the Eastern District of Kentucky, to be held at the city of London, a petition filed against it in said court by W. R. Cress, and warn it that upon its failure to answer the petition will be taken for confessed or it will be proceeded

11 against for contempt; and you will make due return of this summons on the first day of the next May term of said court.

Witness Hon. A. M. J. Cochran, Esq., judge of the district court of the United States at London, in the said district, this 27th day of January, A. D. 1913, and of our independence the 137th year.

J. W. MENZIES, *C. D. C. E. D. of Ky.*,
By GEO. C. MOORE, *D. C.*

(Endorsed:) Received February 1st, 1913, at Covington, Kentucky. Executed February 7th, 1913, at Covington, Kentucky, by handing a copy of this summons and also a certified copy of petition in this case to E. P. Morrow, United States district attorney for the Eastern District of Kentucky.

A. B. PATRICK, *U. S. M.*
By SAM S. SHEPHERD, *Deputy.*

Fee, $4.00.

Affidavit.

(Filed February 24th, 1913.)

United States District Court, Eastern District of Kentucky, sitting at London.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES, DEFENDANT.

12 STATE OF KENTUCKY,
County of Wayne, ss:

The affiant, H. C. Cress, states that he is a member of the firm of W. R. Cress and Son, and as such is of counsel for the plaintiff, W. R. Cress.

Affiant states that on February 8th, 1913, he sent by registered mail to Hon. George W. Wickersham, Attorney General for the defendant, United States, at Washington, D. C., a certified copy of the petition filed by the plaintiff herein.

Affiant files herewith as part hereof a copy of the letter enclosed, with the certified copy of plaintiff's petition, a register receipt showing the delivery of the same, duly stamped, to the postmaster at Monticello for registration, and the receipt of the said Attorney General showing the delivery of same to him.

H. C. CRESS.

Subscribed and sworn to before me by H. C. Cress this February 17th, 1913.

A. J. CRESS,
Notary Public, Wayne County, Kentucky.

My commission will expire January 17, 1914.

(Map impracticable to copy into record. Original attached hereto. The map referred to is exhibit filed with answer, which answer appears on page 14.)

(Here follows map, marked page 13.)

14 *Answer.*

(Filed June 28, 1913.)

United States District Court Eastern District of Kentucky, London, Kentucky.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT.

Comes the defendant, the United States of America, and says that it does not have sufficient knowledge or information to form a belief

as to whether or not W. R. Cress is the owner of or in the actual possession of the boundary of land set up and described in his petition herein, or any part thereof, and therefore denies that the said W. R. Cress is the owner thereof or of any part thereof.

Defendant denies that said farm consists of 189 acres, denies that about twelve acres of the same are bottom land, and denies that any number of acres are upper bottom land or lower bottom land. Defendant denies that Lock and Dam No. 21, erected at a point known as Ganns Island is so backed up or obstructed or raised the natural level of said water in the Cumberland River or at the mouth of Whiteoak Creek, or on the bank thereof adjoining the plaintiff's farm, to a height of about 15 feet, but avers that said water at said
15 point is only 10.7 above the ordinary and usual low-water mark, and was only raised 10.7 feet by the reason of the erection of said lock and dam. The defendant denies that the effect of said lock and dam has been such as to cause the waters of Whiteoak Creek to flow out of its said banks or above or over the lands of the plaintiff to such an extent that the usual and ordinary stages of said water in said pool at about 7 or any other number of acres, except as hereinafter set out is thereby covered with water or destroyed or made worthless; denies that since the ordinary and usual hard rains occured during the winter and spring months, or during the cropping season as they will or do each year, the tides or freshets thereby formed in Whiteoak Creek, and by reason of the construction and maintenance of said lock and dam are caused continuously or at all to spread out, overflow, or stand upon or remain upon or seep through plaintiff's land to such an extent that all or any part of said 7 acres set up in the petition, or 3 acres additional or any other number of acres will be thereafter forever destroyed or damaged or rendered wet or sloppy or boggy or unfit for cultivation; denies that by reason of the erection of said lock and dam that the defendant has thereby rendered 10 acres, or any other number of acres, worthless or destroyed the same; denies that said 10 acres has been heretofore or at all the best or most valuable portion of said farm; denies that the same has been always extremely valuable or rich or fertile or productive. The defendant denies that the back water formed in said creek covered a considerate portion of plain-
16 tiff's said land; denies that only a slight rise of tide, or from one to three feet, will cause the overflow of his said bottoms to the amount of 7 acres, or any other number of acres, as aforesaid; denies that thereby or at all said 10 acres are rendered uncertain or unfit for cultivation; denies that any portion thereof has been rendered wet or boggy; denies that he has thereby been damaged in the sum of $1,100.00 or any other sum, except as hereinafter stated. The defendant denies that the plaintiff owns or has always or at all owned or enjoyed a private or a passway leading from said farm residence to the said bottom lands and across Whiteoak Creek and on through the land of I. S. Brown to the public road at and near the steamboat landing at Mills Springs, Kentucky; denies that by the

erection of said lock and dam his said roadway has been at all destroyed or completely destroyed; denies that said Whiteoak Creek could not be used as a ford and crossing; and denies that the plaintiff's only way of reaching Mills Springs is to travel a distance of between five and six or any other number of miles over a rough road; and denies that by reason thereof his farm has been hemmed in or damaged or injured in the sum of $1,000.00, or any other sum. Defendant denies that the plaintiff has been damaged by reason of the erection of lock and dam, or by reason of the things set up in his petition, in the sum of $2,100.00, or any other sum except as herein stated.

II.

The defendant for further answer herein admits the erection of lock and dam set up and complained of in the plaintiff's petition, but avers that by reason thereof the waters of Cumberland River and White Oak Creek immediately adjoining the land of the plaintiff has not been raised to a greater height than 10.7 feet, and avers that only so much of the land of W. R. Cress as lies between the low original low-water line and the new low-water line 10.7 feet higher has been permanently taken, which amounts in all to about 3/100 acres of which was tillable and which is practically worthless. Defendant further avers that no more than 6.6 acres are injured or damaged to any extent whatever by reason of the construction of the said lock and dam, and of this only 6 and 1/100 acres are tillable. Defendant further avers that the water does not stand upon said land so as to constitute a taking thereof, and has not totally destroyed the same for cultivating purposes, but that the same can still be and continued to be used for the purpose of planting and raising crops, and it will be at all times valuable for grazing and grass purposes; that said land has not been damaged to a greater extent than $50.00 per acre for the tillable portion thereof, and no more than $5.00 per acre for the nontillable portion thereof. 17

The defendant further says that the roadway set up and described in the plaintiff's petition, and for which he claims damages, is entirely upon the property of I. S. Brown, and is owned by the said I. S. Brown, and denies that the said W. R. Cress is entitled to damages in any sum therefor. The defendant further says that the said ford and roadway set up and described in the plaintiff's petition has always been subject to overflows during the ordinary stages of high water, at which time the same was not fordible and could not be used as a road or passway. 18

Defendant files herein and makes a part of his answer herein a map showing the location of the premises and the extent of the overflow of said land, and makes the same a part of its answer herein.

Wherefore, having answered, the United States prays to be hence dismissed, with its costs herein expended.

EDWIN P. MORROW,
U. S. Attorney Eastern District of Ky.

Order.

(Filed Sept. 29th, 1913.)

This day came the plaintiff, and on his motion, the court being advised, it is now ordered that this cause be, and the same is, specially set for trial on Thursday, October 23rd, A. D. 1913.

Order.

(Filed October 25, 1913.)

This day came the parties, plaintiff and defendant, by their respective attorneys, and announced ready for trial before the court and without the intervention of a jury herein. The court heard evidence, and, not being fully advised, takes time, and said evidence is submitted.

19 *Order.*

(Filed April 14th, 1914.)

On the court's own motion, it is now ordered that this cause be, and same is, continued generally.

Affidavit.

(Filed December 23rd, 1913.)

District Court of the United States, Eastern District of Kentucky, Covington.

W. R. CRESS, PLAINTIFF,
v.
UNITED STATES, DEFENDANT.

The affiant, W. R. Cress, states that he had subpœnaed as witnesses in his behalf in the trial of the above-styled cause, each of whom attended at the trial of said cause in obedience to said subpœna, viz: Sam Coe, whose post-office address is Bud, Kentucky; Lewis Richardson, whose post-office address is Faubush, Kentucky; and H. B. Christian, whose post-office address is Rankin, Kentucky.

Affiant says that he paid the expenses of Sam Coe as a witness, as follows: Train fare from Burnside, Ky., to Cincinnati, and return, $10.10; auto fare from Mills Springs to Burnside, Kentucky, and return, $2.00; board and lodging for witness, four days, $6.00; total, $19.10. That he paid to Lewis Richardson, witness, as follows:

20 Train fare from Somerset, Kentucky, to Cincinnati, and return, $9.70; to horse hire from his home at Faubush to Somerset, $1.50; to board and lodging, four days, $6.00; total, $17.20.

That he paid H. B. Christian, train fare from Burnside, Kentucky, to Cincinnati, Ohio, and return, $10.10; auto fare from Mills Springs to Burnside, Kentucky, and return, $2.00; board and lodging for witness, four days, $6.00; total, $19.10. Total for witnesses, $55.40.

The affiant says that the above and foregoing were all of the witnesses subpœnaed by him and all to whom he paid any expenses, and that the above and foregoing account includes nothing except train fare, auto fare, horse hire, board and lodging, all of which were necessary expenditures in the traveling and attendance upon said trial.

W. R. CRESS.

Subscribed and sworn to before me by W. R. Cress December 11th, 1913.

H. C. CRESS,
Notary Public, Wayne County, Kentucky.

Opinion.

(Filed August 14, 1914.)

United States District Court, Eastern District of Kentucky.

W. R. CRESS, PLAINTIFF,
v.
UNITED STATES, DEFENDANT.

21 This is a suit by the plaintiff, W. R. Cress, against the defendant, United States, to recover compensation for the taking of certain real estate in this district by the erection of Lock and Dam No. 21 on the Cumberland River. I make the following findings of fact, to wit:

1st. That at the time of the erection of the dam the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of Cumberland River, and a short distance away from the river, conveyed to him by the commissioner of the Wayne Circuit Court by deed dated May 17th, 1910.

2nd. That by reason of the erection of the lock and dam 6.6 acres of this land is subject to frequent overflows of water from the river and so as to depreciate it one-half of its value.

3rd. That by reason of the erection thereof a ford across Whiteoak Creek and a part of a pass-way is destroyed.

4th. That the 6.6 acres of land was worth $150 an acre, or $990, and the damages thereto is $495.

5th. That the damage to the land by the destruction of the ford was $500.

I conclude that the plaintiff is entitled to recover the sum of $995.00.

A. M. J. COCHRAN, *Judge.*

AUG. 15, 1914.

Order.

(Filed Aug. 25th, 1914.)

This cause having been submitted for a final decree, and finding of facts having heretofore been filed, and no exceptions
22 taken thereto, it is now ordered by the court that the plaintiff have and recover of the United States of America the sum of nine hundred and ninety-five ($995.00) dollars, as set out in said finding of facts, and their costs properly recoverable herein.

Petition for writ of error.

(Filed Feb'y 15, 1915.)

In the District Court of the United States for the Eastern District of Kentucky, held at Covington, April term, 1914.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } 2875.

At law. Petition for writ of error.

Now comes Thomas D. Slattery, United States attorney within the eastern district of Kentucky for and on behalf of the United States, defendant herein, and says that on or about the 25th day of August, 1914, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

23 Wherefore the defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

THOMAS D. SLATTERY,
United States Attorney.

Assignment of error.

(Filed Feb'y 15, 1915.)

In the United States District Court for the Eastern District of Kentucky, held at Covington, April term, 1914.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 875.

Assignment of errors.

The defendant in this action, the United States of America, by its attorney, Thos. D. Slattery, United States attorney, in connection with its petition for writ of error makes the following assignment of errors which it avers exists.

24 First.

The court erred in concluding as a matter of law that the plaintiff is entitled to recover of the defendant the sum of nine hundred and ninety-five ($995.00) dollars, because the court's findings of fact show that neither said six and six-tenths acres of land nor said ford was taken within the meaning of section 5 of the amendment to the Constitution.

Second.

The court erred in adjudging that the plaintiff recover of the defendant the sum of nine hundred and ninety-five ($995.00) dollars.

Third.

The court errred in adjudging that the plaintiff recover of the defendant anything herein, because the findings of fact show that the six and six-tenths acres of land and the ford were not private property taken for public uses within the meaning of the 5th amendment to the Constitution.

Fourth.

The court erred in adjudging that the plaintiff recover of the defendant nine hundred and ninety-five ($995.00) dollars, or anything herein, because the damages to the plaintiff's property were purely consequential, speculative, and remote, and there was not a

taking of plaintiff's property for which compensation should be made within the meaning of the 5th amendment to the Constitution.

25 Fifth.

The court erred in adjudging a recovery to the plaintiff against the defendant for the reason that the damages to plaintiff's land are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

Sixth.

The court erred in adjudging that the defendant is liable for any costs incurred.

Seventh.

The court erred in entering judgment in favor of the plaintiff against the defendant.

Wherefore the defendant prays that the judgment be reversed.

THOMAS D. SLATTERY,
United States Attorney.

Order.

(Entered and filed Feb'y 15, 1915.)

This 15" day of February, 1915, comes the defendant, the United States of America, by Thos. D. Slattery, United States Attorney within the Eastern District of Kentucky, and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings
26 and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court allows the writ of error.

Writ of error.

(Filed Feb'y 15, 1915.)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court of the United States for the Eastern District of Kentucky, before you or some of you, between the United States of America, defendant, and W. R. Cress, plaintiff, a manifest error hath happened, to the great damage of the said United States of America, defendant, as by its complaint appears;

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,
27 to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days of the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what by right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 15" day of February, in the year of our Lord one thousand nine hundred and fifteen.

J. W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky.

The foregoing writ is hereby allowed.

A. M. J. COCHRAN,
United States District Judge of the Eastern District of Kentucky.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. R. Cress:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States beholden at the city of
26 Washington on the 15" day of March, 1915, next, pursuant to a writ of error in the clerk's office of the District Court of the

United States for the Eastern District of Kentucky, wherein the United States of America is defendant and you are plaintiff in error, to show cause, if any there be, why the judgment rendered against the said defendant in error, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Maysville, Kentucky, in the district above mentioned, this 15th day of February, A. D. 1915.

A. M. J. COCHRAN,
United States District Judge for the Eastern Dist. of Ky.

Attest:

J. W. MENZIES,
Clerk United States District Court for the Eastern District of Kentucky.

I acknowledge service of the within citation this 17th day of February, 1915.

W. R. CRESS & SON,
Attorney for Plaintiff.

29 UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, clerk of the District Court of the United States for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing pages contain a full, true, and complete copy of the record in the case of W. R. Cress vs. United States, No. 2875, with the exception of the bill of evidence, which is not included herein, as the same appears from the original now on file in this office.

Witness my hand, as clerk, and the seal of said court, at Covington, this 19th day of February, A. D. 1915.

[SEAL.] J. W. MENZIES,
Clerk U. S. District Court, Eastern District of Kentucky.

30 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. R. Cress:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States beholden at the city of Washington on the 15 day of March, 1915, next, pursuant to a writ of error in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein the United States of America is defendant and you are plaintiff in error, to show cause, if any there be, why the judgment rendered against the said de-

fendant in error, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Maysville, Kentucky, in the district above mentioned, this 15 day of February, A. D. 1915.

A. M. J. COCHRAN,
A. M. J. COCHRAN,
United States District Judge
for the Eastern Dist. of Ky.

Attest.

J. W. MENZIES,
Clerk United States District Court for the
Eastern District of Kentucky.

I acknowledge service of the within citation this 17 day of Feb., 1915.

W. R. CRESS & SON,
Attorney for Plaintiff.

31 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court of the United States for the Eastern District of Kentucky, before you or some of you, between the United States of America, defendant, and W. R. Cress, plaintiff, a manifest error hath happened, to the great damage of the said United States of America, defendant, as by its complaint appears.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days of the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what by right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court the 15 day of February, in the year of our Lord one thousand nine hundred and fifteen.

J. W. MENZIES,
Clerk District Court of the United States
for the Eastern District of Kentucky.

The foregoing writ is hereby allowed.

A. M. J. COCHRAN,
United States District Judge
for the Eastern District of Kentucky.

Filed Feb. 15, 1915.

J. W. MENZIES,
U. S. Clerk.

(Indorsement on cover:) File No. 24621. E. Kentucky D. C., U. S. Term No. 877. The United States, plaintiff in error, vs. W. R. Cress. Filed March 18, 1915. File No. 24621.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR, v. W. R. CRESS. } No. 84.

THE UNITED STATES, PLAINTIFF IN ERROR, v. ACHILLES KEELY ET AL. } No. 718.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance case No. 718, to be heard with No. 84 as one case, for hearing on a day convenient to the court. It is suggested that the date of joint hearing be made the first Monday in December next.

These are suits to recover damages to and the value of certain lands, etc., of defendants in error, alleged to have been either permanently destroyed or taken by the United States in the improvement

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of navigable waters, without the payment of just compensation.

The legal points are the same in both cases and they can be conveniently argued together on behalf of the United States at one hearing.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1916.

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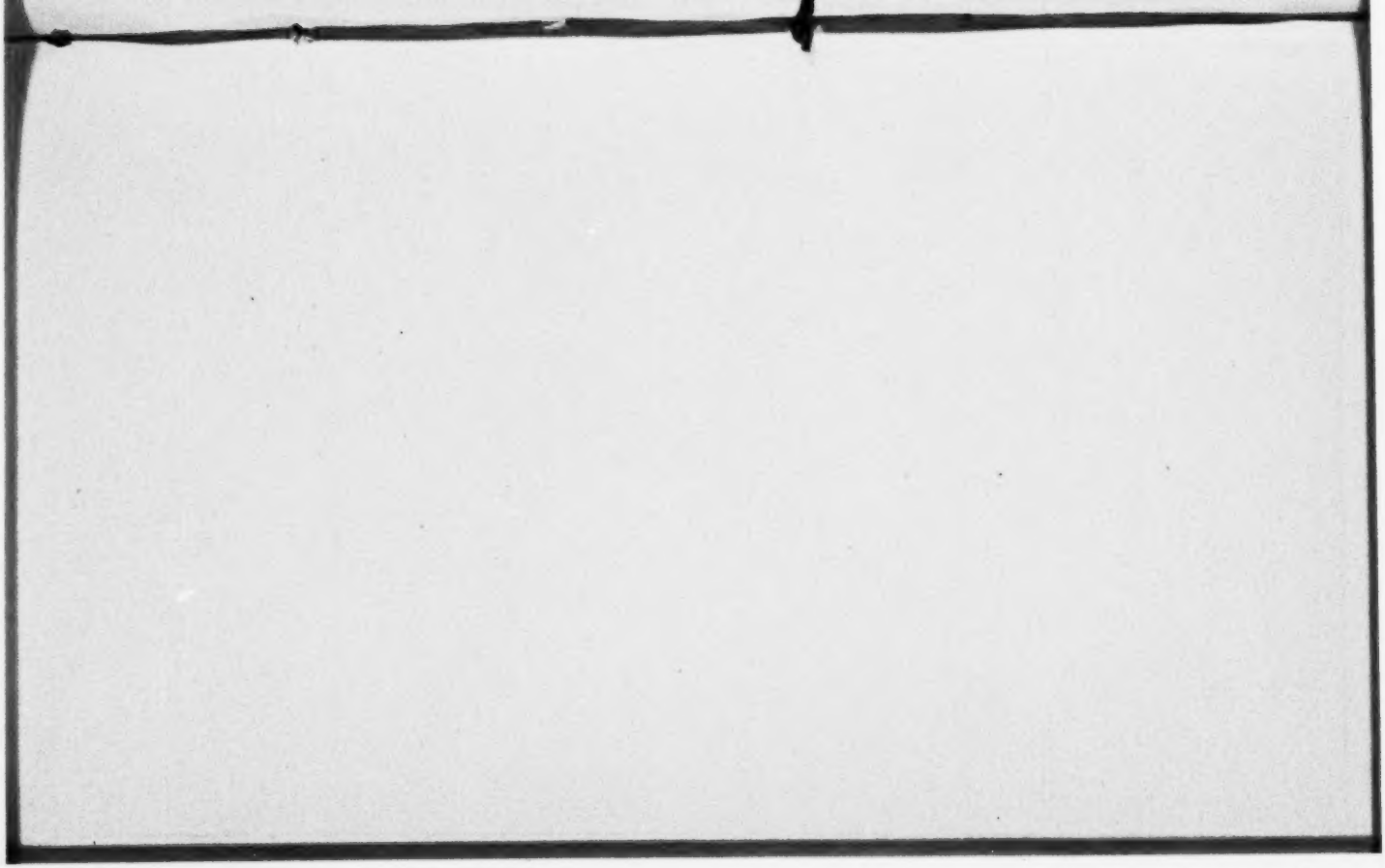

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
W. R. CRESS. } No. 84.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendant in error was the owner of a tract of land on Whiteoak Creek, a tributary of the Cumberland River, in Wayne County, Kentucky. The property in question was located approximately 1,000 feet above the confluence of the creek and the river. Defendant in error used a ford across Whiteoak Creek for the purpose of getting from his land to the land of I. S. Brown and thus reaching the steamboat landing at Mills Springs, Kentucky.

The Government erected Lock and Dam No. 21 on the Cumberland River below the mouth of Whiteoak Creek. This backed the water up the river and also up Whiteoak Creek, and caused 6.6 acres of the land

of defendant in error to be subject "to frequent overflows of water from the river" so as to depreciate it one-half of its value. It also raised the water line in the creek, and, in the language of finding 3 (Rec. 11), "a ford across Whiteoak Creek and a part of a passway is destroyed."

The court allowed defendant in error $495 as damages to the 6.6 acres, and $500 as "damage to the land by the destruction of the ford." (Finding 5, Rec. 11.)

As there is no opinion in this case, and as the findings do not agree with the petition and are so very limited, it is difficult to discover upon what theory the court reached its conclusions. Reading the findings (Rec. 11) as a whole the Government understands the court's position to be that because the said 6.6 acres of land were depreciated one-half of their value, due to frequent overflows, this constituted a taking; that as a ford between the land of defendant in error and that of Brown across Whiteoak Creek which the former used in order to reach the steamboat landing on the Cumberland River was destroyed, the same decreased the value of the land of defendant in error, and that damages should be allowed for the decrease in value by reason of the destruction of the ford.

For convenience the findings (Rec. 11) are set forth in full, as follows:

> 1. That at the time of the erection of the dam the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of Cumberland River, and a short distance away

from the river, conveyed to him by the Commissioner of the Wayne Circuit Court by deed dated May 17th, 1910.

2. That by reason of the erection of the lock and dam 6.6 acres of this land is subject to frequent overflows of water from the river and so as to depreciate it one-half of its value.

3. That by reason of the erection thereof a ford across Whiteoak Creek and a part of a passway is destroyed.

4. That the 6.6 acres of land was worth $150 an acre, or $990, and the damages thereto is $495.

5. That the damage to the land by the destruction of the ford was $500.

The Government's position is that finding 2 on its face demonstrates that there was no taking of the land, in that it was not made "absolutely valueless," "permanently injured," or "permanently flooded"; that defendant in error, so far as the record shows, never had an easement over the premises of his neighbor Brown; that whatever interest defendant in error had in the ford which was destroyed, since none of his land was taken, was subject to the paramount right of the Government to use the bed of the stream within its banks in aid of the navigable capacity of the Cumberland River; that the Government is not liable for the costs taxed in this case.

ASSIGNMENTS OF ERROR.

First. The court erred in concluding as a matter of law that the plaintiff is entitled to recover of the defendant the sum of nine hun-

dred and ninety-five ($995) dollars, because the court's findings of fact show that neither said six and six-tenths acres of land nor said ford was taken within the meaning of section 5 of the amendment to the Constitution.

Second. The court erred in adjudging that the plaintiff recover of the defendant the sum of nine hundred and ninety-five ($995) dollars.

Third. The court erred in adjudging that the plaintiff recover of the defendant anything herein, because the findings of fact show that the six and six-tenths acres of land and the ford were not private property taken for public uses within the meaning of the fifth amendment to the Constitution.

Fourth. The court erred in adjudging that the plaintiff recover of the defendant nine hundred and ninety-five ($995) dollars, or anything herein, because the damages to the plaintiff's property were purely consequential, speculative, and remote, and there was not a taking of plaintiff's property for which compensation should be made within the meaning of the fifth amendment to the Constitution.

Fifth. The court erred in adjudging a recovery to the plaintiff against the defendant for the reason that the damages to plaintiff's land are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

Sixth. The court erred in adjudging that the defendant is liable for any costs incurred.

Seventh. The court erred in entering judgment in favor of the plaintiff against the defendant.

BRIEF OF ARGUMENT.

I. The damage to the land of defendant in error from overflow did not measure up to a taking under the fifth amendment to the Constitution, but was only a partial injury, for which the Government is not liable.

II. Defendant in error, so far as the record shows, did not have an easement over the premises of I. S. Brown, and could not, therefore, recover damages to his property by the destruction of a ford.

III. No land having been taken or easement destroyed, whatever interest defendant in error had in the ford was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Cumberland River.

IV. The Government is not liable for the costs taxed in this case.

ARGUMENT.

I.

The damage to the land of the defendant in error from overflow did not measure up to a taking under the fifth amendment to the Constitution, but was only a partial injury for which the Government is not liable.

In discussing the subject of a taking under the fifth amendment to the Constitution with respect to the flooding of real property by backing up of rivers, this court has used such language as "destroying the entire value" of the land; "total destruction"; "substantial destruction." In the case of *United States* v. *Lynah*, 188 U. S. 445, 470, the court has said that a taking results in "an actual appropriation of the land, including the possession, the right of possession, and the fee." By finding 2 (Rec. 11) the damage to the land in question is clearly left outside these definitions when it declares "That by reason of the erection of the lock and dam 6.6 acres of this land is subject to frequent overflows of water from the river and *so as to depreciate it one-half of its value.*"

This court has always been careful to distinguish between property taken by the Government and that which has been merely damaged. The leading decision on the question of the taking of property by overflow as a result of the construction of river and harbor improvements is that in the *Lynah case* (*supra*). There a cross-tide dam was erected in the

Savannah River. The waters were raised to such a height that Lynah's land, located at some distance above the dam, was permanently submerged to a depth of 18 inches. The result was that there was a total destruction of the plantation for the cultivation of rice, for which it was chiefly valuable, and hence a destruction of its market value. This court held that the permanent overflow of the plantation was equivalent to a taking by the United States within the meaning of the fifth amendment and that the law raised an implied contract to make just compensation. Mr Justice Brewer, speaking for the court, said (p. 470):

> While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the Government and it becomes henceforth the full owner.
>
> *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.
> *Jackson* v. *The United States*, 230 U. S. 1.
> *Willink* v. *The United States*, 240 U. S. 572.

A comparison of the facts in the ~~foregoing~~ Lynah cases with those in the case at bar shows a distinct line of cleav-

age. There is no finding in the case at bar that there was any land made valueless, permanently injured, or permanently flooded. On the contrary the findings refute such an idea. Moreover, the possession or fee to the land has not passed. If the determining factor be that the title and possession shall pass to the United States as in ordinary condemnation proceedings, then the facts in this case fall far short of a taking.

The findings, however, do present a case where there has been some damage done to the real property by frequent overflows, and a consequential and remote damage to the real property due to the destruction of a ford across Whiteoak Creek. Hence in these particulars it comes within the line of the decisions as exemplified by the case of *Gibson* v. *The United States*, 166 U. S. 269, 275. In this case access to plaintiff's land, situated on Neville Island in the Ohio River below Pittsburgh was impeded and as a consequence the land was depreciated in value from $600 to $200 per acre. This court held that it was not a taking of private property by the Government for which compensation must be made, and that the injury complained of was damnum absque injuria.

> The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental con-

sequence of the lawful and proper exercise of a governmental power.

Scranton v. *Wheeler*, 179 U. S. 141.
Bedford v. *United States*, 192 U. S. 217.
Jackson v. *United States*, 230 U. S. 1.

Particular attention is called to the case of *Highbridge Lumber Company* v. *United States* (69 Fed. 320, 326). The late Mr. Justice Lurton, as circuit judge of the United States Circuit Court of Appeals, summarizing the conclusion of the court, said:

> What we hold is: First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. That such injuries are apprehended in respect of lands of plaintiff in error not condemned gives no greater right to recover than if the purpose was to construct the proposed dam on the land of a third person. Second. To now seek compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder, and amount to a "taking" of such land, is premature. The remainder has not yet been "taken," and until it has been appropriated in fact, by permanent flooding, no right to be compensated will accrue. Third. Neither the anticipated change in the current of the river, nor the anticipated increase in danger from fire during the work of construction, are proper subjects for compensation. Both are injuries

purely consequential, and constitute no actionable claim against the Government.

Jonathan Walls v. *United States*, 44 C. Cls. 482.

Tompkins, extrx. v. *United States*, 45 C.Cls. 66.

Mills v. *United States*, 46 Fed. 738.

II.

Defendant in error, so far as the record shows, did not have an easement over the premises of I. S. Brown and could not therefore recover damages to his property by the destruction of a ford.

It is essential to the claim of defendant in error for damages to his land by the destruction of a ford that he have an easement in a passway over the premises of I. S. Brown. The petition does not allege an easement; the answer denies an easement, and the court does not find that defendant in error had an easement in the passway or the ford and makes no reference to a grant or prescriptive right over Brown's premises. The burden is upon the defendant in error to prove an easement by either grant or prescription. He obviously failed to do this for if he had it would have been incumbent upon the court to so find. There being, then, no destruction of an easement, the damage alleged to be done by the destruction of a ford is too remote and consequential to be chargeable to the Government.

According to the findings defendant in error purchased his farm May 17, 1910, about one year and a half before this proceeding was begun. He alleges

(Rec. 4, par. 2) that "the farm owned by this plaintiff has always been used and enjoyed a private passway leading from said farm residence down through said bottom lands and across said Whiteoak Creek and on through the lands of I. S. Brown to the public road, at and near the steamboat landing at Mills Springs, Kentucky." How did he acquire such ownership? Was it by grant or prescription? There is no record of a grant and no allegation showing how a prescriptive right had been obtained. It is, of course, but a mere legal conclusion to plead (Rec. 5) that "the easement that had always belonged to said farm" had been destroyed. By reference to the map on file in this case, as prepared by the Corps of Engineers, U. S. Army, and signed by Major S. H. Burgess, the cultivation line of I. S. Brown's land at the point where the ford crosses from the land of defendant in error to Brown's land is so close to the original cultivation line as to make practically no change. It may well be that the court could not find any damages to the land owing to the destruction of a passway on Brown's land and therefore confined itself, as it did, to damages due to the destruction of the ford.

Moreover, the Government in its answer (Rec. 8) denies that the defendant in error "owns or has always or at all owned or enjoyed a private or a passway leading from said farm residence to the said bottom lands and across Whiteoak Creek and on through the land of I. S. Brown to the public road at and near the steamboat landing at Mills Springs, Kentucky." And again (Rec. 9, par. 2)

denies any title on the part of defendant in error to the said road running over Brown's premises, and alleges "that the said ford and roadway set up and described in the plaintiff's petition has always been subject to overflows during the ordinary stages of high water, at which time the same was not fordable and could not be used as a road or passway." If, then, there is no finding of an easement in a right of way for the destruction of which defendant in error could recover, upon what does the court lodge its judgment for damages? The court finds "damage to the land by the destruction of the ford." As defendant in error owned to the middle of the stream, he could not recover for a passway on his own land up to that point, because the court does not find that there was any land taken. Neither can he recover for a passway from the middle of the stream over Brown's land, for the court abandoned any claim for damage to a passway. Furthermore, there is no finding that defendant in error had an interest equivalent to an appurtenant easement in a passway over Brown's land. Hence the question of any claim for damages is narrowed down to loss of value in the land of defendant in error by reason of the destruction of the ford. Here one enters the twilight zone in endeavoring to discover what is meant by damages for the destruction of the ford. The petition and answer are in direct conflict as to what right defendant in error had to the use of the ford, and the findings shed no light upon the source of his title.

One can readily perceive that the value of the land might be lessened by the destruction of the ford even though there was no prescriptive right, but the mere destruction would not entitle the riparian landowner to damages because of its lessening the value of the land. Thus the case differs radically both in fact and law from that of the *United States* v. *Welch*, 217 U. S. 333. Welch had "*a private deeded passway*" (Welch brief, p. 2) from his land over that of a party named Sewell to a county road. It was the only practical way of egress from and ingress to Welch's farm. Between the Welch and Sewell farms ran Four Mile Creek, which emptied into the Kentucky River. The passway in question crossed this creek and traversed Sewell's farm to a point where it connected with the county road. By the construction of a lock and dam in the Kentucky River the water was backed up the creek and out over the lands of both Welch and Sewell at a point where the passway crossed from Welch's farm to Sewell's farm. The land of both Welch and Sewell at the location of the ford was permanently and completely destroyed and the private passway for some distance on the Welch and Sewell farms was permanently flooded.

The lower court, in part, found that—

> The only practical outlet for plaintiffs, from their farm to the county road, was a private roadway running across the upper end of their bottom for about fifty yards, then over the

lands of Lizzie Sewell for about three hundred yards.

In order for plaintiffs to reach the county road, *since this private roadway was submerged,* they would have to go around on a ridge about two miles out of their way. The bluff they would have to go up in order to get on this ridge is very steep and it is not practical to make a road that way.

Plaintiffs *had a right of way* over the Sewell land, which lies on the opposite side of the creek from plaintiff's land and adjoins the county road. This private roadway was a good way to get out. *This roadway, by reason of a pool caused by the dam, stands about twelve to fourteen feet under water all the time.* The lands farther up the stream are owned by other parties, and plaintiffs have no right of way over them.

The destruction of this private roadway lessens the value of plaintiffs' farm at least $1,700. It was only about three hundred yards from plaintiffs' farm to the county road the way they had the right to go. The town of Ford is about three miles distant from their farm, and is the nearest post office, the nearest place to which they haul their crops.

The map found in the brief for the defendant in error in the Welch case shows that the private passway on each side of Four Mile Creek was permanently submerged and land taken beyond the banks of the creek.

Thus the Welch case and the one at bar differ principally in the following respects:

First. In the former the court finds there was land permanently submerged and taken, while here there is no taking, but only a partial and consequential damage.

Second. In the former there was an easement acquired by deed in a passway and the said passway was destroyed, while here there is no finding that there was an easement or a destruction of one, but only the destruction of a ford.

Third. In the former the Sewell land which the passway traversed was submerged by a permanent pool and thus taken, while here there was no land upon which there was a passway belonging to defendant in error, that the court found was taken nor, so far as we know, was there any of Brown's land taken.

In the case of the *United States* v. *Grizzard*, 219 U. S. 180, 184, 185, Mr. Justice Lurton, delivering the opinion of the court, said:

> If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated and leaving him uncompensated for the depreciation over benefits to that which remains.
>
> * * * * *
>
> Both the petition and the finding show that access to the public road has been cut off by the *intervention of flooded land actually taken.*
>
> * * * * *
>
> To say that such an owner would be compensated by paying him only for the narrow

> strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.

In the case at bar the court is asked to go far beyond what was found in either the Grizzard or the Welch case, and to award damages to the land of defendant in error by reason of the destruction of a ford where none of his land was taken, or, so far as we know, any of the land of his neighbor upon which a passway was located. Defendant in error seeks to recover, although it has not been found that he had an easement in this passway, or that this was the only practical way by which he could get to the landing on the Cumberland River.

The Government suggests that the allowance of a claim for damages to land by the destruction of a ford, where no land is taken or easement destroyed, would set a precedent of tremendous importance in the matter of governmental control of the navigability of rivers and harbors.

III.

No land having been taken or easement destroyed, whatever interest defendant in error had in the ford was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Cumberland River.

The Cumberland River is a navigable stream at its junction with Whiteoak Creek. This fact is evidenced by the allegation of the complaint (Rec. 4,

par. 2), that defendant in error enjoyed a private passway across the farm of I. S. Brown to the public road "at and near the steamboat landing at Mills Spring, Kentucky, a place at which a public ferry is kept and the nearest and most convenient route to market, post office, and the courthouse at Monticello, Kentucky, and which said wharf and steamboat landing could be reached from said farm residence over the said private passway at a distance of not exceeding a mile and a quarter."

As the lands of Brown were upstream from the junction with Whiteoak Creek, the foregoing quotation would indicate that steamboats passed up and down the river in front of Whiteoak Creek. Moreover, the court will undoubtedly take judicial notice that the records of the War Department and congressional action in the form of appropriations show that the Government has been dealing with the navigability of the Cumberland River ever since 1832. Its navigability is established by the fact that Congress has since that date exercised "commercial power" over this river.

In Gould on "Waters" (3d ed., sec. 72, p. 145), discussing the case of *McManus* v. *Carmichael*, the author says:

> * * * That the test of the navigability of the Mississippi River is ascertained by use or by public acts or declarations.

Since the Cumberland River is subject to the control of the Government for navigable purposes, its tributary, Whiteoak Creek, within its banks is subject

to the uses of the Government for navigable purposes, and anyone using a ford across the creek does so in subordination to the paramount right of the Government. It is evident that in order to make the river above the dam navigable it was necessary to raise the water. In doing this it backed up Whiteoak Creek, thereby destroying a ford which defendant in error had been using, but without taking any of defendant in error's land. In such a situation it would seem logical to say that the owner whose land abuts the creek is in the same position as if he were riparian owner along the banks of the Cumberland River. Congress in its control of the navigation of the Cumberland River, and the Secretary of War acting for it, must also control its tributaries. Otherwise it would be impossible in most instances to control the navigation of the river. The only way to prevent the water backing up in the creek would be to build a dam where it flows into the river. This would obviously be a practical impossibility for the reason that the floods would back up on the inside of the dam and ruin land on both sides of the creek. Moreover, if the main body of the river did not have the use of the creek for storage it might not have water sufficient to make a constant depth for navigation.

Mr. Justice McKenna in the case of *Greenleaf Johnson Lumber Company* v. *Garrison*, 237 U. S. 231, 263, said:

> When Congress acts necessarily its power extends to the whole expanse of the stream and is not dependent on the depth or shallowness of the water. To recognize such dis-

> tinction would be to limit the power when and where its exercise might be most needed.

If Congress has the power to assume control over and expend money to make a shallow stream navigable by backing up water behind a dam, it must also have the right to use the bed of a tributary within its banks to meet the same purpose—i. e., to regulate the navigable capacity of the stream.

Again, in Gould on "Waters" (3d ed. 1900, sec. 72, p. 145), in discussing the case of *McManus* v. *Carmichael*, the author said:

> It was held upon a full review of the earlier authorities that although the ebb and flow of the tide was the common-law test of navigability, yet the term "navigable" embraced not only the idea of *capacity for navigation* but also that of publicity. [Italics ours.]

In the case of the *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 703, the court said:

> Second, that it [the State] is limited by the superior power of the General Government to secure *the uninterrupted navigability* of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take *all needed measures to preserve the navigability of the navigable water courses of the country* even against any State action. [Italics ours.]
>
> *United States* v. *North Bloomfield Gravel Mining Company*, 81 Fed. 243. Affirmed, 32 C. C. A. 84. Also see Weil on "Water Rights" (3d ed., vol. 1, sec. 337, p. 358).

The language of the act of September 19, 1890 (26 Stat. 454, sec. 10), is suggestive:

> That the creation of any obstruction not affirmatively authorized by law to the *navigable capacity* of any waters in respect of which the United States has jurisdiction is hereby prohibited. [Italics ours.]

If the United States has control of the navigable capacity of a navigable stream, does it not also have the right to raise the water within the banks of one of the navigable stream's tributaries, by a dam in the river, just as much as to raise the water in a shallow part of the main course of the river?

It will be noted that the lower court speaks of the ford being "destroyed" and that the damages to the land by reason of the destruction of the ford were $500. Was this passway and ford the only practical means by which the steamboat landing could have been reached, as in the *Welch case, supra*? There is no finding that it was the only practical place. There is nothing to indicate that he could not have crossed the creek in a boat or ferry, or, if necessary, swung a bridge. At the point where the ford was located it was a very narrow stream, as indicated by the map, and this could have been done. The fact that it would entail some expense to do this would not constitute a taking.

Manigault v. *Springs*, 199 U. S. 473.

Admitting for the sake of the argument only that defendant in error had an easement over a passway crossing the Whiteoak Creek, can it be said that

there was a destruction amounting to a "taking" where he still might have gotten over by many other means than wading? The burden being upon him to prove a destruction equivalent to a taking, and the court having failed to find facts from which such an inference could be drawn, the situation would seem to indicate a partial damage, if he had an easement, rather than a destruction equivalent to a taking.

In view of the fact that none of his land was taken the proposition would seem to be very much like that in the case of *Mills* v. *United States, supra*. There the question arose over the filling up of drainage ditches in rice fields on the Savannah River by raising the river through the construction of a dam, so that it became necessary to provide new drainage costing $10,000, for which Mills claimed damages. The court held that Mills could not recover.

The C. B. & Q. Railway Co. v. *Drainage Commissioners*, 200 U. S. 561, p. 586;
Bedford v. *United States*, 192 U. S. 217.

Furthermore, if the Government had, from time immemorial and long before defendant in error or his grantors had forded the creek, the right to the free use of its bed for the run-off from the watershed above and these waters aided in the navigation of the river, by the same token it should have the right to the use of the bed of the creek within its banks for other navigable purposes, including that of backing water up from the river so long as no land was taken.

Assuming that the Government has such control of Whiteoak Creek the rights of the defendant in error would be the same as if he had been a riparian owner on the banks of the Cumberland River.

In *Gibson* v. *United States* (*supra*, p. 276) Mr. Chief Justice Fuller, speaking for the court, said:

> Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. * * *
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property and was merely incidental to the exercise of a servitude to which her property had always been subject.

Bedford v. *United States*, 192 U. S. 217.

Transportation Co. v. *Chicago*, 99 U. S. 635.

Scranton v. *Wheeler*, 179 U. S. 141.

Hood v. *United States*, 49 C. Cls. 669.

Zimmerman v. *Union Canal Co.*, 1 Watts and Sergeants Rep. 346 (Pa.).

IV.

The Government is not liable for the costs taxed in this case.

The judgment herein carries with it costs erroneously taxed against the United States. (Rec. 10, 11, 12.)

Prior to the enactment of the Judicial Code costs were properly taxable against the United States under the provisions of section 15 of "An act to pro-

vide for the bringing of suits against the Government of the United States," commonly known as the Tucker Act (24 Stat. 505). Section 297 of the Judicial Code, however, repealed all of the Tucker Act with the exception of sections 4, 5, 6, 7, and 10 (36 Stat. 1168). The petition in the case at bar was filed after the Judicial Code became effective, and hence there was no provision of law authorizing the taxation of costs against the United States.

In *The Antelope* (12 Wheat. 546, 550) the court said:

> It is a general rule that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the Government.
>
> *United States* v. *McLemore*, 4 How. 286.
> *United States* v. *Boyd*, 5 How. 291.
> *United States* v. *Verdiet*, 164 U. S. 213, 219.
> *Pine Ridge Logging Co.* v. *United States*, 186 U. S. 279, 296.

CONCLUSION.

For the reasons hereinbefore set forth it is respectfully submitted that the trial court erred in deciding against the Government on the claims presented and for costs, and that its judgment should be reversed in all respects.

HUSTON THOMPSON,
Assistant Attorney General.
P. M. COX,
SETH SHEPARD, JR.,
Attorneys.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ACHILLES KELLY, GREEN B. KELLY, JR., LILLIAN KELLY CRAWFORD, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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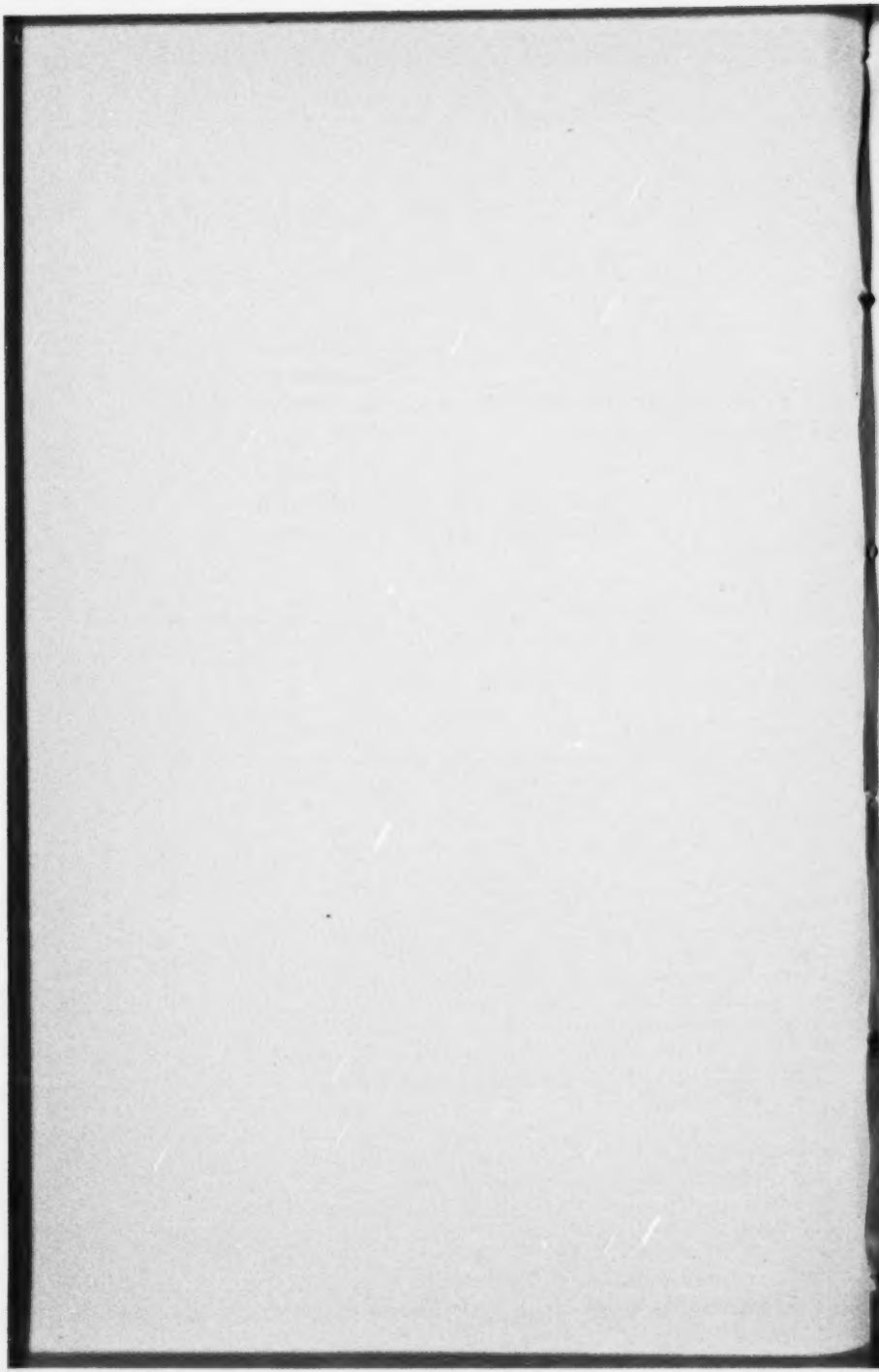

a United States District Court, Eastern District of Kentucky, at Richmond, Kentucky.

ACHILLES KELLY, GREEN B. KELLY, Jr., LILLIAN Kelly, Crawford & Owen Crawford, her husband, Mamie Everett & Luke Everett, her husband, Stella Ashcraft, Nettie Boltz & Oliver Boltz, her husband, Herbert Ashcraft, James Ashcraft, Stanley Kelly, Howell and Hood Howell, her husband, plaintiffs,

versus

UNITED STATES OF AMERICA, CHARLES W. Sale, Nanny Sale Azbill, and A. C. Azbill, her husband, defendants.

Transcript of Record. No. 201.

1 Be it remembered that heretofore, to wit, December 20th, 1913, a petition was filed herein, in words and figures as follows, viz:

United States District Court, Eastern District of Kentucky, sitting at Richmond, Kentucky.

ACHILLES KELLY, GREEN B. KELLY, Jr., LILLIAN Kelly, Crawford & Owen Crawford, her husband, Mamie Everett & Luke Everett, her husband, Stella Ashcraft, Nettie Boltz & Oliver Boltz, her husband, Herbert Ashcraft, James Ashcraft, Stanley Kelly, Howell and Hood Howell, her husband, plaintiffs,

versus

UNITED STATES OF AMERICA, CHARLES W. Sale, Nanny Sale Azbill, and A. C. Azbill, her husband, defendants.

Petition.

2 The plaintiffs, Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford, and Owen Crawford, her husband; Mamie Everett and Luke Everett, her husband; Stella Ashcraft; Nettie Boltz and Oliver Boltz, her husband; Herbert Ashcraft; James Ashcraft; Stanley Kelly Howell and Hood Howell, her husband, say that one Green B. Kelly, sr., departed this life intestate on the 26th day of April, 1900, being at the time of his death a citizen of and domiciled in Estill County, Kentucky, leaving surviving him as his only children and heirs at law the plaintiffs, Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford, Stanley Kelly Howell, and the plaintiffs, Mamie Everett, Stella Ashcraft, Nettie Boltz, Herbert Ashcraft, James Ashcraft, and one Fred Ashcraft, who are the only living children and heirs at law of Mary Kelly Ashcraft, a daughter of said decedent, who died in the lifetime of her father, the said

Green B. Kelly, sr., and the defendants, Charles W. Sale, Nanny Sale Azbill, and one Samuel H. Sale, who were and are the only living children and heirs at law of Susan Sale, a daughter of said decedent, Green B. Kelly, sr., who died before the said Green B. Kelly, sr.

Plaintiffs say that the plaintiffs, Lillian Kelly Crawford and Owen Crawford, are husband and wife; that the plaintiffs, Mamie Everett and Luke Everett are husband and wife; that the plaintiffs, Nettie Boltz and Oliver Boltz, are husband and wife; that the plaintiffs, Stanley Kelly Howell and Hood Howell, are husband and wife; and that the defendants, Nanny Sale Azbill and A. C. Azbill, are husband and wife.

Plaintiffs say that the full names and places of residence of the plaintiffs are as follows: Achilles Kelly, Estill County, Ken-
3 tucky; Green B. Kelly, jr., Estill County, Kentucky; Lillian Kelly Crawford, Clark County, Kentucky; Owen Crawford, Clark County, Kentucky; Mamie Everett, Kansas City, Missouri; Luke Everett, Kansas City, Missouri; Stella Ashcraft, Kansas City, Missouri; Nettie Boltz, Helena, Arkansas; Oliver Boltz, Helena, Arkansas; Herbert Ashcraft, Estill County, Kentucky; James Ashcraft, Estill County, Kentucky; Stanley Kelly Howell, Estill County, Kentucky; Hood Howell, Estill County, Kentucky; and that the defendants, Charles W. Sale, resides in Estill County, Kentucky; and that the defendant, Nanny Sale Azbill, and the defendant, A. C. Azbill, her husband, are nonresidents of the State of Kentucky and are now absent therefrom, and that they reside in Ingersoll, in the State of Oklahoma; and that the place where a post office is kept nearest to where said defendants reside is at Ingersoll, in the State of Oklahoma.

Plaintiffs say that at the time of his death and for more than thirty years prior thereto, the said Green B. Kelly, sr., deceased, was seized in fee simple and in possession of a certain tract of land situated in Estill County, Kentucky, on Millers Creek, containing five and one-half (5½) acres and bounded as follows: Beginning at a hickory on the bank of Millers Creek; thence down said creek as it meanders, N. 82 E. 11, W. 65 E. 6, S. 13 E. 18, S. 14 W. 24, S. 39 W. 12, S. 60 W. 5, to a stone on the bank of said creek; thence N. 53 W. 54 poles to the beginning, containing five acres and including the mill and mill site and a small tract of land lying across and on the east side of said Millers Creek and on the east bank thereof, including the abutments of the mill dam as near in the center as possible, containing one-half acre of land.

4 Plaintiffs say that said tract of land had upon it at the time it was overflowed, injured and damaged as hereinafter set out, a dwelling house of five rooms, a large two-story store house, and a large and valuable water mill, operated by valuable water power afforded by means of a mill dam across the said creek, which was wholly constructed upon said land and belonged, together with all the rights, privileges, and appurtenances of said mill dam and mill site,

to the said Green B. Kelly, sr., at the time of his death aforesaid, and at his death descended to his children and heirs at law as hereinabove set out; that said land was the same land conveyed to the said Green B. Kelly, sr., by deed from James Benton and wife, dated January 7th, 1867, and of record in the office of the clerk of the Estill County Court in deed book N, page 295, a copy of said deed, duly certified by the clerk of the said court, is filed herewith and made a part hereof, marked "A."

Plaintiffs say that the said Samuel H. Sale sold and conveyed all his undivided interest in and to the said tract of land above described to the defendant Charles W. Sale, on the 18th day of June, 1906, by deed which is recorded in said clerk's office in deed book 29, page 420; and they say that the said Fred Ashcraft, by a proper deed, conveyed all his interest in said land to the plaintiff, Nettie Boltz, on the 21st day of July, 1906, which said deed is of record in the office of the said clerk in deed book 27, page 589, a copy of said deed, duly certified by the said clerk, will be filed herewith when or if required.

Plaintiffs say that the said Nettie Boltz is and has been since
5 the last-named date, the owner in fee simple and in possesion of the said interest of the said Fred Ashcraft in said land.

The plaintiffs says that after the dam hereinafter described was constructed as hereinafter set out, the defendant, Green B. Kelly, jr., on the 26th day of April, 1909, sold and conveyed his interest in said land to the defendant Charles W. Sale, who is now and has been since said last named date, the owner of said interest of said Green B. Kelly, jr., in said land.

Plaintiffs say that said two small tracts of land constituted but one tract and boundary and were used for a mill site, milldam and mill, and for the storehouse and dwelling thereon, and constitute but one tract or parcel of land.

Plaintiffs say that between the years 1907 and January 10th, 1909, the defendant, The United States of America, its officers, agents, servants, and employees, constructed a lock and dam upon and across the Kentucky River, in Estill County, Kentucky, a short distance above the town of Irvine and about four miles below plaintiff's said land, whereby the waters of the said river were obstructed and impeded in their natural flow and dammed up and held back up and into said Millers Creek, and upon plaintiff's said land, whereby the natural level of said river was raised at pool level in said Millers Creek and on the lands of the said plaintiffs to the height of at least fifteen feet, when said dam was completed and became filled with water, to wit, in January, 1909.

Plaintiffs say that the said defendant, The United States of America, its officers, agents, servants, and employees have, since same was completed as herein above set out, continuously maintained
6 and operated said lock and dam, and will so continue to maintain and operate same continuously; that the effect of the construction, maintenance, and operation of said lock and dam has been

at all times since the construction thereof and since the 10th day of January, 1909, and will forever be, to form a pool of still or slack water, extending up and into said creek and upon the said lands of the plaintiffs, and that thereby the waters of said creek are, have been and will forever be, obstructed and impeded in their natural flow, and that the said pool of still or slack water thereby formed completely covers and drowns out the said milldam of the plaintiffs so as to render the said dam and mill, storehouse and dwelling absolutely worthless and of no value to the plaintiffs, and when the usual and ordinary hard rains which fall each year during the winter and spring months and throughout the cropping season, fall as they do and will each year, the usual and ordinary tides and freshets thereby caused in said creek and in said river and its tributaries will flow upon the plaintiffs' said lands, and that the waters thereof have been and will be, solely by reason of the construction, operation, and maintenance of said lock and dam, and the pool of still or slack water so formed, continuously forced out of the natural channels and banks of said creek, and will be continuously and periodically during the cropping season, caused to spread out over the plaintiffs' said lands, and will stand upon, remain, and seep through and on plaintiffs' said lands so as to destroy and render worthless at least four acres thereof.

Plaintiffs say that said lock and dam as same are and were designed and constructed, in addition to the immovable parts
7 thereof, are provided and equipped with a steel or iron superstructure known and commonly called a needle, which forms and constitutes a part of said dam as same was designed and is now constructed, which said steel or iron structure is a movable structure placed upon the top of the immovable part of said dam and about six (6) feet in height, and that when same is used as the same was and is designed, constructed, and will be used the said pool of still or slack water formed by said dam will be raised an additional height of about six feet, and that when the same is so used the waters of said creek and river will be further dammed up and held back and impeded in their natural flow to such an extent that all the remainder of said tract of land will be submerged and covered by the usual and ordinary tides and freshets which do and will periodically occur annually, caused by the usual and ordinary hard rains, and that thereby an additional acre of said land, including all the land occupied by said mill, storehouse, and dwelling, will be periodically and annually covered with water to such an extent as to render said mill, storehouse, and dwelling untenantable and worthless, and will render said land, including all of the improvements thereon, worthless and of no market or salable value.

Plaintiffs say that all of said land is valuable creek bottom land and is and has been at all times prior to the injuries herein complained of extremely valuable, fertile, and productive.

Plaintiffs say that by reason of the destruction of said land and the small and insufficient amount of cultivating land left remaining, and by reason of the destruction of said mill site and mill dam, the

remaining land has thereby been injured, damaged, and impaired in value, and the improvements thereon rendered useless and
8 worthless for the purposes of a mill and store and dwelling and for cultivating purposes, whereby said tract of land has been injured and impaired in value in the sum of ten thousand ($10,000.00) dollars.

The plaintiffs say that the plaintiffs and the defendants, Charles W. Sale and Nanny Sale Azbill, have been damaged in the said sum of ten thousand ($10,000.00) dollars, and they say that said defendants, Nanny Sale Azbill and A. C. Azbill, her husband, have refused to unite in this action as plaintiffs.

Plaintiffs say that no proceedings were ever instituted by the United States of America to condemn the plaintiffs' said land, and that no offer was ever made by the said defendant to contract with the plaintiffs for said land nor for the use of same or any portion thereof, and that the plaintiffs have never received any compensation from the said defendant nor from any other person for any of the injuries herein complained of.

Wherefore the plaintiffs pray that said Charles W. Sale, Nanny Sale Azbill, and A. C. Azbill, her husband, be made defendants and required to answer herein; that said defendant, Charles W. Sale, be duly summoned by proper process of this court, and that the said nonresident defendants, Nanny Sale Azbill and A. C. Azbill, be constructively summoned, and they pray that a warning order be issued by this court against them, ordering and warning them to appear and answer in this action; and the plaintiffs pray that the plaintiffs, Achilles Kelly and others, recover judgment against the defendant, The United States of America, in the said sum of ten thousand ($10,000.00) dollars, and therein costs herein expended upon the facts and law of this case and for all proper relief.

9 NETTIE BOLTZ,
LILLIAN KELLY CRAWFORD,
Plaintiffs.

J. F. WINN,
Attorney for Plaintiffs.

The affiant, Nettie Boltz, says that she is one of the plaintiffs in the above-styled action, and that the statements of the foregoing petition are true, as she verily believes.

NETTIE BOLTZ.

Sworn to and subscribed before me by said Nettie Boltz this the 17th day of December, 1913.

ANDREW H. HAMPTON, JR.,
Notary Public.

The affiant, Lillian Kelly Crawford, says that she is one of the plaintiffs in the above-styled action, and that the statements of the foregoing petition are true, as she verily believes.

LILLIAN KELLY CRAWFORD.

Subscribed and sworn to before me by Lillian Kelly Crawford this, the 20th, day of December, 1913.

ANDREW H. HAMPTON, Jr.,
Notary Public.

This indenture, made and entered into this the 7th day of January, 1867, by and between James Benton, of the first part, and G. B. Kelly, of the second part, all of Estill County, State of Kentucky.

Witnesseth: That for the consideration of the sum of twelve hundred dollars in hand paid, the receipt of which is hereby acknowledged, the party of the first part has this day granted, bargained, and sold to the party of the second part a certain tract or parcel of land in Estill County, on Millers Creek, and bounded as follows:

Beginning at a hickory on the bank of Millers Creek, thence down said creek as it meanders N. 82 E. 11 poles, S. 65 E. 6 poles, S. 13 E. 18 poles, S. 14 W. 24 poles, S. 39 W. 12 poles, S. 60 W. 5 poles, to a stone on the bank of said creek; thence N. 3 W. 54 poles to the beginning, including the mill and mill seat and all the rights and privileges and appurtenances thereunto attached or in anywise belonging; and the said Benton also conveys to the Kelly the right of to and from the spring on the adjoining land lately owned by Webber Harris, deceased, and now by his heirs, &c., and close to the boundary aforesaid, which boundary includes five acres,

11 and the said Benton covenants that the said Kelly shall have the free right and use of said spring forever; and the said Benton, for the consideration aforesaid, hereby sells, conveys, and confirms to the Kelly one-half acre of land in addition to the aforesaid five acres on the opposite side of said creek and on the bank thereof, to be laid off in a square as near as possible and to include the abutments of the milldam as near in the center as possible, to be laid off at the expense of said Benton.

To have and to hold the aforesaid tract of land unto the said Kelly, together with all the rights, privileges, and appurtenances thereunto attached or in any wise appertaining or belonging. Also the right of way to and from said spring and the free use of the same forever, free from the claim or demand of the party of the first part.

It is understood between the parties that the party of the second part takes the aforesaid premises, mill &c., subject to the lease of an oil or mineral company, and also subject to a lease of W. G. Kirk on said property. Kelly to have all the right, benefits, and profits of said two leases, or either of them, and the said Benton will forever warrant and defend the title to the aforesaid premises unto the said Kelly against all claims whatever.

In testimony whereof, the said James Benton, together with Fannie C. Benton, his wife, who hereby relinquishes her right of dower in and to the land hereby conveyed, have hereunto set their hands and seals the day and date aforesaid.

JAMES BENTON. (SEAL.)
FANNIE C. BENTON.

12 STATE OF KENTUCKY,
Estill County, sct.

I, Morton M. Price, clerk of Estill County Court, do certify that this deed from James Benton and wife was produced to me in my county on the 28th day of January, 1867, and was acknowledged by James Benton and Fannie C. Benton to be their act and deed for the uses and purposes therein stated, whereupon the same has been recorded in my office duly stamped.

MORTON M. PRICE, *C. E. C. C.*

STATE OF KENTUCKY,
County of Estill, sct.

I, C. T. Grinstead, clerk of the Estill County Court, certify that the foregoing is a true and correct copy of the deed from James Benton and wife to G. B. Kelly as appears of record in my office in deed book "N" at page 295.

Witness my hand as clerk aforesaid at the courthouse in the city of Irvine this 26th day of November, A. D. 1913.

C. T. GRINSTEAD, *Clerk.*
By HARRY B. WILSON,
Deputy Clerk.

13 And on a day following, to wit, June 30th, 1914, an agreed order was entered herein, in words and figures as follows, viz:

ACHILLES KELLY AND OTHERS, PLAINTIFF,
v.
UNITED STATES AND OTHERS, DEFENDANT. } Agreed Order.

This day came the parties, plaintiffs and defendants, by their respective attorneys, and by agreement it is now ordered that all allegations of the petition herein be and they are traversed of record.

And on a day following, to wit, April 20th, 1916, a finding of fact and conclusions of law was filed herein, in words and figures as follows, viz:

14 United States District Court, Eastern District of Kentucky.

ACHILLES KELLY AND OTHERS, PLAINTIFFS,
v.
UNITED STATES AND OTHERS, DEFENDANTS, } No. 201.

This is a suit to recover just compensation for the taking of certain real estate by the erection of Lock and Dam No. 12 on the Kentucky River in this district. I make the following findings of fact, to wit:

1st. That the erection of the lock and dam was completed the latter part of December, 1909, or the first part of January, 1910.

2nd. That at that time the plaintiffs, Achilles Kelly, Lillian Kelly Crawford, Mamie Everett, Stella Ashcraft, Nettie Boltz, Herbert

Ashcraft, and Stanley Kelly Howell, the defendant, Charles W. Sale, were the owners in fee simple and in the possession of a certain tract of land situated in Estill County, Kentucky, on Millers Creek, a branch of the Kentucky River, containing five and one-half ($5\frac{1}{2}$) acres and bounded as follows:

Beginning at a hickory on the bank of Millers Creek; thence down said creek as it meanders N. 82 E. 11 poles; S. 65 E. 6 poles; S. 13 E. 18 poles; S. 14 W. 24 poles; S. 39 W. 12 poles; S. 60 W. 5 poles to a stone on the bank of said creek; thence N. 3 W. 54 poles to the beginning, on which there is a mill and a mill seat, a store building, and residence.

3rd. That the interests of the said parties therein were as follows, to wit:

Achilles Kelly, one-sixth;
Lillian Kelly Crawford, one-sixth;
Mamie Everett, one-thirty-sixth;
Stella Ashcraft, one-thirty-sixth;
Nettie Boltz, one-eighteenth;
Herbert Ashcraft, one-thirty-sixth;
James Ashcraft, one-thirty-sixth;
Stanley Kelly Howell, one-sixth;
Charles W. Sale, one-third.

4th. That by reason of the erection of the lock and dam the mill can no longer be driven by water power. The water above the lock and dam. when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill. The property is not otherwise injured by the lock and dam.

5th. No part of the land or mill is overflowed or covered by a pool stage of water; nor is the mill physically damaged thereby.

6th. Miller's Creek is not a navigable stream.

7th. The mill and store were not abandoned for lack of business before the completion of the lock and dam. The store was put out of business by the construction of the dam and suspension of the mill. But the business of the mill and store had fallen off before the construction thereof and without reference to it.

8th. The land has not been enhanced in value by the construction of the lock and dam.

9th. The damages sustained by the owners of the mill by reason of cutting off the water power I place at $1,500. The record contains very little evidence from which I can determine the real extent of such damages, and I can not see my way clear to place it at any greater sum. This does not include anything on account of the store, as I do not consider that a proper element of recovery. It represents the depreciation of the valuation of the mill property by cutting off the water power.

Judgment should be entered for $1,500.

A. M. J. COCHRAN,
Judge.

And on a day following, to wit, April 24th, 1916, a judgment was filed herein, in words and figures as follows, viz:

17 In the District Court of the United States for the Eastern District of Kentucky.

ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS. } Judgment.

The court having on the 20th day of April, 1916, filed his findings of facts and law herein, finding that the plaintiffs are entitled to judgment in the sum of fifteen hundred ($1,500.00) dollars, it is therefore ordered and adjudged by the court that the plaintiffs, Achilles Kelly, Lillian Kelley Crawford, Mamie Everett, Stella Ashcraft, Nettie Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelley Howard, and the defendant Chas. W. Sale have and recover of the defendant, the United States of America, the sum of fifteen hundred ($1,500.00) dollars, with interest thereon at the rate of four per cent per annum from this date until paid, and their costs in this action expended to be taxed by the clerk in accordance with the provisions of the statute in such case made and provided.

It further appearing that all the parties of record in this proceeding are of full age and represented by counsel of record and consenting thereto, it is adjudged that said sum be collected

18 by the said J. F. Winn, attorney of record for the plaintiffs, and he is authorized to sign their names to such receipts, vouchers, or other papers as may be necessary for that purpose, to have effect as if they were present and signing same in person. Of this sum it is adjudged that the several parties are entitled as follows: Achilles Kelly, 1/6; Lillian Kelley Crawford, 1/6; Mamie Everett, 1/36; Stella Ashcraft, 1/36; Nettie Boltz, 1/18; Herbert Ashcraft, 1/36; James Ashcraft, 1/36; Stanley Kelley Howard, 1/6; and Chas. W. Sale, 1/3.

To all of which the defendant, The United States of America, objects and excepts.

And on a day following, to wit, August 1st, 1916, an assignment of errors was filed herein, in words and figures as follows, viz:

19 In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, April term, 1916.

ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS. } Assignment of Errors.

The defendant in this action, the United States of America, by its attorney, Thomas D. Slattery, United States attorney for the Eastern

District of Kentucky, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, exist:

FIRST.

The court erred in concluding as a matter of law that the plaintiffs are entitled to recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars, because the court's findings of fact show that there was no taking of private property for public use, within the meaning of the fifth amendment to the Constitution.

SECOND.

20 The court erred in adjudging that the plaintiffs recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars.

THIRD.

The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the findings of fact show that no part of the land or mill is overflowed or covered by a pool stage of water, nor the mill physically damaged thereby.

FOURTH.

The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the construction of the lock and dam causes the water above the lock and dam to pool and prevents the drop in the current which is necessary to run plaintiffs' mill, as this is not a taking of private property for public use within the meaning of the fifth amendment to the Constitution, but makes out a case of damage without injury; that is, a case sounding in tort and without the jurisdiction of the trial court under the Tucker Act, as amended by the Judicial Code.

FIFTH.

The court erred in adjudging that the plaintiffs recover of the defendant one thousand five hundred ($1,500.00) dollars, or anything herein, because the damages to the plaintiffs' property was
21 purely consequential, speculative, and remote, and there was not a taking of plaintiffs' property for which compensation should be made within the meaning of the fifth amendment to the Constitution.

SIXTH.

The court erred in adjudging a recovery to the plaintiffs against the defendant for the reason that the damages to plaintiffs' land and

property are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

SEVENTH.

The court erred in adjudging that the defendant is liable for any costs incurred. Since the repeal by the Judicial Code of section 15 of the Tucker Act there is no provision of law for allowance of costs against the United States in actions under said act.

EIGHTH.

The court erred in entering judgment in favor of the plaintiffs against the defendant.

Wherefore the defendant prays that the judgment be reversed.

THOS. D. SLATTERY,
United States Attorney.

22 And on the same day, to wit, August 1st, 1916, a petition for writ of error was filed herein, in words and figures as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, April term, 1916.

ACHILLES KELLY & OTHERS, PLAINTIFFS, *vs.* UNITED STATES & OTHERS, DEFENDANTS.	At law.	Petition for writ of error.

Now comes Thomas D. Slattery, United States attorney within the Eastern District of Kentucky, for and on behalf of the United States, defendant herein, and says:

That on or about the 24th day of April, 1916, this court entered judgment herein in favor of the plaintiffs and against the defendant, The United States of America, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

23 Wherefore the defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

THOS. D. SLATTERY,
United States Attorney.

And on the same day, to wit, August 1st, 1916, an order allowing the writ was entered herein in words and figures as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, Kentucky, April term, 1916.

24 ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS. } At law, order allowing the writ.

This 1st day of August, 1916, comes the defendant, The United States of America, by Thomas D. Slattery, United States attorney within the eastern district of Kentucky, and files herein and presents to the court his petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court allows the writ of error.

A. M. J. COCHRAN,
United States District Judge, Eastern District of Kentucky.

25 United States Supreme Court.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:
The President of the United States.

To the honorable the judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between Achilles Kelly et al. *v.* United States of America et al., No. 201, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington on the* 1st day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and forty-first year.

J. W. MENZIES,
Clerk of the District Court of the United States.
W. C. BENNETT, *D. C.*

Allowed by
A. M. J. COCHRAN,
District Judge.

I hereby accept service of the within writ, this 10th day of August, 1916.

J. F. WINN,
Atty. for Appellees, except
Chas. W. Sale, Nannie Sale Azbill & A. C. Azbill.

25½ I hereby accept service of the within writ, this 25th day of August, 1916.

HUGH RIDDELL,
Atty. for C. W. Sale, Nannie G. Azbill, Alex C. Azbill.

(Indorsed:) No. 201. United States Supreme Court for the Sixth Circuit. Achilles Kelly et al. vs. United States. Writ of error. Filed Aug. 25th, 1916. J. W. Menzies, Clk. W. C. Bennett, D. C.

26 United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss.

To Achilles Kelly, Green B. Kelly, Jr., Lillian Kelly Crawford, and Owen Crawford, Mamie Everett, and Luke Everett, Stella Ashcraft, Nettie Bolyz, and Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell, and Hood Howell, Charles W. Sale, Nannie Sale Azbill, and A. C. Azbill, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court for the sixth circuit, to be holden at the city of Washington, in said circuit, on the 1st day of September next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein United States of America is appellant and Achilles Kelly et al. is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, as judge of the said district court, and the seal of said court, at Richmond this 1st day of August, in the year of

*Not exceeding 30 days from the day of signing the citation.

our Lord one thousand nine hundred and sixteen and of our independence the 141st year.

A. M. J. COCHRAN,
Judge of the U. S. District Court,
Eastern District of Kentucky.

I hereby accept service of the within citation this 10th day of August, 1916.

J. F. WINN,
Atty. for Appellees, Achilles Kelly, Green B. Kelly, Lillian Kelly Crawford, Owen Crawford, Mamie Everett, Luke Everett, Stella Ashcraft, Nettie Boltz, Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell, and Hood Howell.

I hereby accept service of the within citation this 25th day of August, 1916.

HUGH RIDDELL,
Atty. for C. W. Sale, Nannie G. Azbill, and Alex C. Azbill.

(Indorsed:) No. 201. U. S. District Court, Eastern District of Kentucky. Achilles Kelly et al. vs. United States et al. Citation. Filed 25th day of Aug., 1916. J. W. Menzies, Clerk. By W. C. Bennett, D. C.

27 In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, Kentucky, April term, 1916.

ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS.
} No. 201.

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28 *Certificate.*

I, J. W. Menzies, clerk of the District Court of the United States for the Eastern District of Kentucky at Richmond, do hereby certify that the foregoing 26 pages contain and full and complete copy of the petition, agreed order June 30th, 1914, traversing of record the

allegations of the petition, findings of fact, and conclusions of law, judgment, assignment of errors, application for writ of error, order allowing writ, writ of error and return thereon, and citation and return in the matter set out in the caption hereto, as the same appears from the records and files of this office. Witness my hand as clerk and the seal of said court at Richmond, this 25th day of August, 1916.

[SEAL.]

J. W. MENZIES, *Clerk.*
W. C. BENNETT, *D. C.*

29 United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss.

To Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford and Owen Crawford, Mamie Everett and Luke Everett, Stella Ashcraft, Nettie Boltz and Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell and Hood Howell, Charles W. Sale, Nannie Sale Azbill and A. C. Azbill, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 1st day of September next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein United States of America is appellant and Achille Kelly et al. is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand as judge of the said district court, and the seal of said court, at Richmond this 1st day of August, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the 141st year.

A. M. J. COCHRAN,
Judge of the U. S. District Court, Eastern District of Kentucky.

I hereby accept service of the within citation this 10 day of August, 1916.

J. F. WINN,
Atty. for appellees, Achilles Kelly, Green B. Kelly, Lillian Kelly Crawford, Owen Crawford, Mamie Everett, Luke Everett, Stella Ashcraft, Nettie Boltz, Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell, and Hood Howell.

I hereby accept service of the within citation this 25 day of August, 1916.

HUGH RIDDELL,
Atty. for C. W. Sale, Nannie G. Asbill, Alex C. Asbill.

(Indorsed:) No. 201. U. S. District Court, Eastern District of Kentucky. Achilles Kelly et al. vs. United States et al. Citation. Filed 25 day of Aug., 1916. J. W. Menzies, Clerk. By W. C. Bennett, D. C.

30 United States Supreme Court for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss.

The President of the United States.

To the honorable the judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between Achilles Kelly et al. *v.* United States of America, No. 201, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington on the* 1st day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and sixteen and of the independence of the United States of America the one hundred and forty-first year.

J. W. MENZIES,
Clerk of the District Court of the United States.
W. C. BENNETT, *D. C.*

Allowed by
A. M. J. COCHRAN,
District Judge.

I hereby accept service of the within writ this 10 Aug., 1916.

J. F. WINN,
Atty. for Appellees, except Chas. W. Sale, Nannie Sale Asbill, and A. C. Asbill.

* Not exceeding 30 days from the day of signing the citation.

I hereby accept service of the within writ, this 25 day of August, 1916.

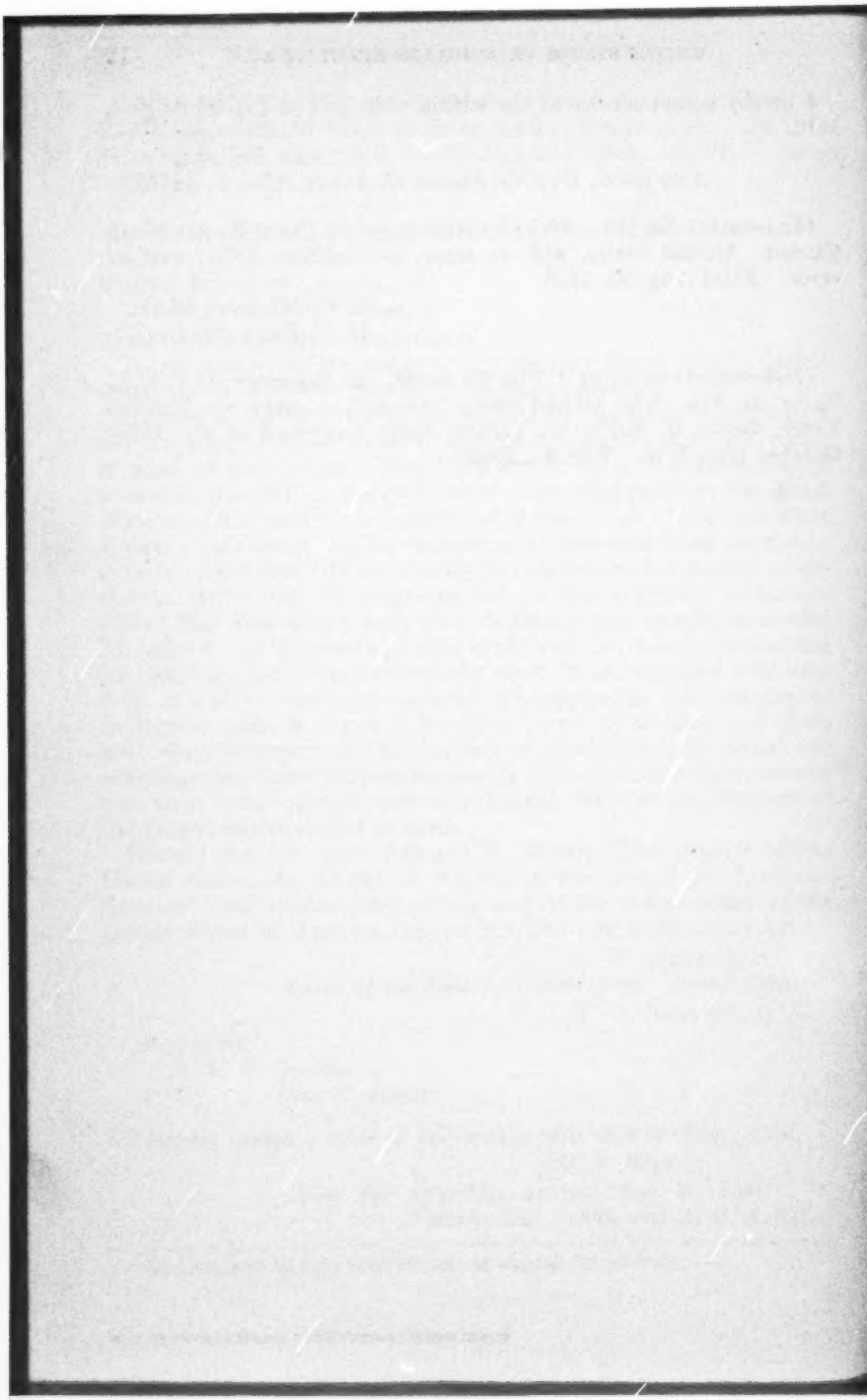
HUGH RIDDELL,
Atty for C. W. Sale, Nannie G. Asbill, Alex. C. Asbill.

(Indorsed:) No. 201. United States Supreme Court for the Sixth Circuit. United States, plff. in error, vs. Achilles Kelly, writ of error. Filed Aug. 25, 1916.

J. W. MENZIES, *Clerk.*
W. C. BENNETT, *D. C.*

(Indorsement on cover:) File No. 25548. E. Kentucky, D. C. U. S. Term No. 718. The United States, plaintiff in error, *vs.* Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford et al. Filed October 11th, 1916. File No. 25548.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1916



In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ACHILLES KELLY, GREEN B. KELLY, JR., Lillian Kelly Crawford, et al.
No. 718.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

As the findings herein are very brief, contain most of the essential facts, and indicate the ground upon which the court rendered its judgment, the material portions are herewith set forth in lieu of a statement of the facts in the case.

> This is a suit to recover just compensation for the taking of certain real estate by the erection of Lock and Dam No. 12 on the Kentucky River in this district. I make the following findings of fact, to wit:
>
> 1st. That the erection of the lock and dam was completed the latter part of December, 1909, or the first part of January, 1910.

2nd. That at that time the plaintiffs * * * were the owners in fee simple and in the possession of a certain tract of land situated in Estill County, Kentucky, on Millers Creek, a branch of the Kentucky River, containing five and one-half (5½) acres, * * * on which there is a mill and a mill seat (site), a store building, and residence.

3rd. That by reason of the erection of the lock and dam the mill can no longer be driven by water power. The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill. The property is not otherwise injured by the lock and dam.

4th. No part of the land or mill is overflowed or covered by a pool stage of water; nor is the mill physically damaged thereby.

5th. Millers Creek is not a navigable stream.

6th. The mill and store were not abandoned for lack of business before the completion of the lock and dam. The store was put out of business by the construction of the dam and suspension of the mill. But the business of the mill and store had fallen off before the construction thereof and without reference to it.

7th. The land has not been enhanced in value by the construction of the lock and dam.

8th. The damages sustained by the owners of the mill by reason of cutting off the

water power I place at $1,500. The record contains very little evidence from which I can determine the real extent of such damages, and I can not see my way clear to place it at any greater sum. This does not include anything on account of the store, as I do not consider that a proper element of recovery. It represents the depreciation of the valuation of the mill property by cutting of the water power.

Judgment should be entered for $1,500.

The court evidently rendered its judgment upon the theory that there was a taking of an easement belonging to defendants in error through the destruction of the use of water power for their mill in Miller's Creek by the backing up of water from the lock and dam in the Kentucky River.

The Government's position is that since no land of defendants in error was taken, whatever interest they had in the use of the creek for water-power purposes was subject to the paramount right of the Government to use the bed of the stream within its banks in aid of the navigable capacity of the Kentucky River; that the Government is not liable for the costs taxed in this case.

ASSIGNMENTS OF ERROR.

First. The court erred in concluding as a matter of law that the plaintiffs are entitled to recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars, because the court's findings of facts show that there was no taking of private property

for public use within the meaning of the fifth amendment to the Constitution.

Second. The court erred in adjudging that the plaintiffs recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars.

Third. The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the findings of fact show that no part of the land or mill is overflowed or covered by a pool stage of water, nor the mill physically damaged thereby.

Fourth. The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the construction of the lock and dam causes the water above the lock and dam to pool and prevents the drop in the current which is necessary to run plaintiff's mill, as this is not a taking of private property for public use within the meaning of the fifth amendment to the Constitution, but makes out a case of damage without injury; that is, a case sounding in tort and without the jurisdiction of the trial court under the Tucker Act, as amended by the Judcial Code.

Fifth. The court erred in adjudging that the plaintiffs recover of the defendant one thousand five hundred ($1,500.00) dollars or anything herein, because the damages to the plaintiffs' property was purely consequential, speculative, and remote, and there was not a taking of plaintiffs' property for which compensation should be made within the meaning of the fifth amendment to the Constitution.

Sixth. The court erred in adjudging a recovery to the plaintiffs against the defendant for the reason that the damages to plaintiffs' land and property are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

Seventh. The court erred in adjudging that the defendant is liable for any costs incurred. Since the repeal by the Judicial Code of section 15 of the Tucker Act there is no provision of law for allowance of costs against the United States in actions under said act.

Eighth. The court erred in entering judgment in favor of the plaintiffs against the defendant.

BRIEF OF ARGUMENT.

I. In view of the fact that no land was taken, whatever interest defendants in error had in the stream flow of the creek was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Kentucky River.

II. The Government is not liable for the costs taxed in this case.

ARGUMENT.

I.

In view of the fact that no land was taken, whatever interest defendants in error had in the stream flow of the creek was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Kentucky River.

The question presented under this heading is a very narrow one. The lower court found that there was no taking of land or overflowing of the mill or premises belonging to the defendants in error. The sole issue is whether defendants in error have the right to recover damages from the Government because the damming up of the Kentucky River caused the water to back up in the creek so that at pool stage it was about 1 foot below the crest of their mill dam, thus preventing the drop in the current necessary to run the mill.

The court will undoubtedly take judicial notice that the records of the War Department and congressional action in the form of appropriations show that the Government has been dealing with the navigability of the Kentucky River ever since 1879. Navigability is established by the fact that Congress has since that date exercised "commercial power" over this river.

In Gould on "Waters" (3d ed., sec. 72, p. 145), discussing the case of *McManus* v. *Carmichael,* the author says, * * * "the test of the navigability of the Mississippi River is ascertained by use or by public acts or declarations."

Since the Kentucky River is subject to the control of the Government for navigable purposes, its tributary, Miller's Creek, within its banks, is subject to the uses of the Government for navigable purposes, and any one using the creek for mill purposes does so in subordination to the paramount right of the Government. It is evident that in order to make the river above the dam navigable it was necessary to raise the water. In doing this the water backed up Miller's Creek so as to make the depth at pool stage where the mill of defendants in error was located, 1 foot below the crest of the mill dam, thus preventing the drop in the current necessary to run the mill. In such a situation it would seem logical to say that the owner whose land abuts the creek is in the same position as if he were a riparian owner along the banks of the Kentucky River. Congress in its control of the navigation of the Kentucky River, and the Secretary of War acting for it, must also control its tributaries. Otherwise it would be impossible in most instances to control the navigation of the river. The only way to prevent the water backing up in the creek would be to build a dam where it flows into the river. This would create an impossible situation under ordinary conditions and floods would back up on the inside of the dam and ruin land on both sides of the creek. Moreover, if the main body of the river did not have the use of the creek for storage it might not have water sufficient to make a constant depth for navigation.

Mr. Justice McKenna, in the case of *Greenleaf Johnson Lumber Company* v. *Garrison*, 237 U. S. 251, 263, said:

> When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent on the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed.

If Congress has the power to assume control over and expend money to make the shallow parts of a river navigable by backing up water behind a dam and to control its "whole expanse," it must also have the right to use the bed of a tributary within its banks to aid in regulating the navigable capacity of the river.

In "Gould on Waters" (3d ed. 1900, sec. 72, p. 145), in discussing the case of *McManus* v. *Carmichael*, the author said:

> It was held, upon a full review of the earlier authorities, that, although the ebb and flow of the tide was the common-law test of navigability, yet the term "navigable" embraced not only the idea of *capacity for navigation* but also that of publicity. [Italics ours.]

In the case of the *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 703, the court said:

> Second, that it [the State] is limited by the superior power of the General Govern-

> ment to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take *all needed measures to preserve the navigability of the navigable water courses of the country* even against any State action. [Italics ours.]

United States v. *North Bloomfield Gravel Mining Company,* 81 Fed. 243. Affirmed, 32 C. C. A. 84. Also see Weil on "Water Rights" (3d ed., vol. 1, sec. 337, p. 358).

The language of the act of September 19, 1890 (26 Stat. 454, sec. 10), is suggestive:

> That the creation of any obstruction, not affirmatively authorized by law, to the *navigable capacity* of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. [Italics ours.]

Moreover, if the Government had from time immemorial, and long before the defendants in error or their grantors had used the stream for driving a mill, the right to the use of its bed for the run-off from the watershed above, and these waters aided navigation, it would seem reasonable to say that it had the right to the use of the bed of the creek within its banks for other navigable purposes, including that of backing up the water, so long as no land was taken.

Assuming that the Government had the control of Miller's Creek within its banks for storage purposes above Lock and Dam No. 12 on the Kentucky River, the rights of the defendants in error would be the same as if they had been riparian owners on the banks of the Kentucky River. In *Gibson* v. *United States,* 166 U. S. 276, Mr. Chief Justice Fuller, speaking for the court, said:

> Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard.
>
> * * * * *
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

Bedford v. *United States,* 192 U. S. 217.

Transportation Co. v. *Chicago,* 99 U. S. 635.

Scranton v. *Wheeler,* 179 U. S. 141.

Hood v. *United States,* 49 C. Cls. 669.

Zimmerman v. *Union Canal Co.,* 1 Watts and Sergeants Rep. 346. (Pa.)

Manigault v. *Springs,* 199 U. S. 473.

The Government suggests that the allowance of a claim for damages where no land is taken or easement destroyed, would set a precedent of tremen-

dous importance in the matter of governmental control of the navigability of rivers and harbors.

II.

THE GOVERNMENT IS NOT LIABLE FOR THE COSTS TAXED IN THIS CASE.

The costs in this action were erroneously taxed against the United States.

Prior to the enactment of the Judicial Code costs were properly taxable against the United States under the provisions of section 15 of "An act to provide for the bringing of suits against the Government of the United States," commonly known as the Tucker Act (24 Stat. 505). Section 297 of the Judicial Code, however, repealed all of the Tucker Act with the exception of sections 4, 5, 6, 7, and 10 (36 Stat. 1168). The petition in the case at bar was filed after the Judicial Code became effective and hence there was no provision of law authorizing the taxation of costs against the United States.

In *The Antelope* (12 Wheat. 546, 550) the court said:

> It is a general rule that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is party, either on behalf of any suitor or any officer of the Government.
>
> *United States* v. *McLemore,* 4 How. 286.
>
> *United States* v. *Boyd,* 5 How. 291.

United States v. *Verdier,* 164 U. S. 213, 219.

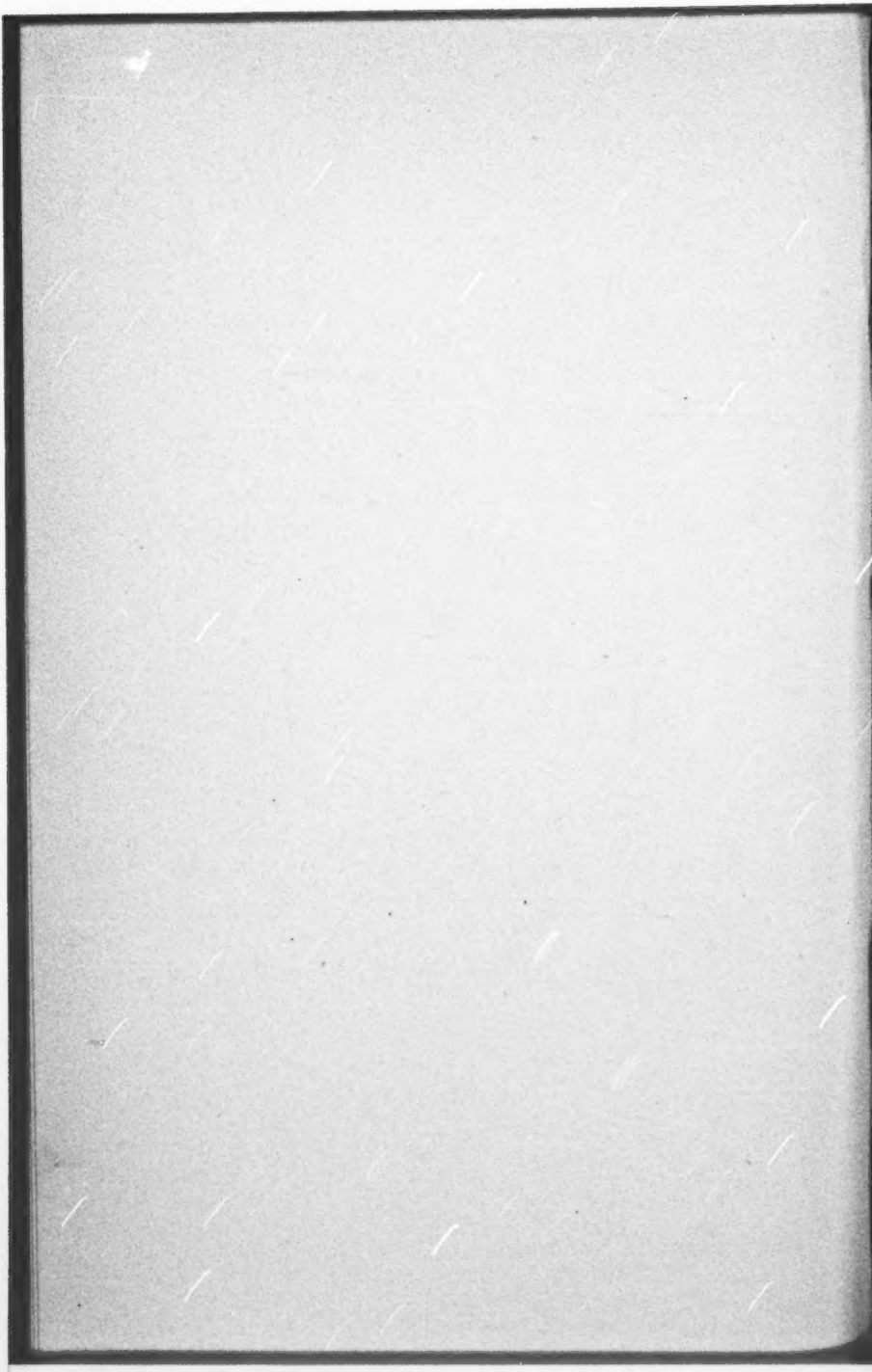
Pine Ridge Logging Co. v. *United States,* 186 U. S. 279, 296.

CONCLUSION.

For the reasons hereinbefore set forth it is respectfully submitted that the trial court erred in rendering judgment for damages against the Government and for costs, and that its judgment should be reversed.

HUSTON THOMPSON,
Assistant Attorney General.

○



Office Supreme Court, U. S.
FILED
DEC 7 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, PLAINTIFF IN ERROR,

versus

ACHILLES KELLY, GREEN B. KELLY, JR., LILLIAN KELLY CRAWFORD, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANTS IN ERROR.

J. F. WINN,
For Defendants in Error.

WESTERFIELD-ROBTS CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

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STATEMENT.

This action was brought under the provisions of the "Tucker Act," as modified by "The Judicial Code," to recover the value of property alleged to have been taken and destroyed by the United States as an incident to the improvement of the Kentucky River for the purposes of navigation.

The defendants in error were the owners of two small tracts of land lying on both sides of Miller's Creek in Estill County, Ky., containing a mill, a mill seat, with a dam of masonry fourteen feet in height, and a store house and dwelling. The property was valuable chiefly because of the mill property and the valuable water

power afforded by the milldam across Miller's Creek, a tributary of the Kentucky River. The two tracts contain only about five and one-half acres, and constitute one boundary, and the mill and milldam are situated about one-half mile above the mouth of Miller's Creek. The title to the property is not disputed by the plaintiff in error, and the petition filed by the defendants in error, as plaintiffs in the court below, shows that the title of the defendants in error to the property in controversy, was derived by inheritance from their ancestor, Green B. Kelly, Senior, deceased (Record, page 1), and the record evidence, by authenticated copy of the deed filed with the petition (Record, page 6), establishes the title of Green B. Kelly by purchase from Benton and wife, under said deed, which bears date of January 7, 1867. No answer was filed by the United States, but the allegations of the petition, were by stipulation of the parties, traversed of record in the court below (Record, page 7). No claim of ownership of, or of title to the property was made by the defendant in the court below, and it is assumed that no such claim will be asserted in this court.

The United States acquired its proprietary rights over the Kentucky River by Act of the General Assembly of the Commonwealth of Kentucky, approved January 24, 1880.

Some years after the passage of this act of cession above cited, the United States, acting through its officers and agents, under authority of various acts of Congress, undertook to continue the improvement of the river, which had been begun by the State of Kentucky, and

erected a system of locks and dams, about fourteen in number, and in December, 1909, as shown by this record, completed lock and dam "Number 12," in Estill County, Ky., situated a short distance above the city of Irvine, and about four miles below the mouth of Miller's Creek. The evidence shows, and the trial court has found, that Miller's Creek is not a navigable stream (Record, page 7). The evidence shows that the property as a whole had been diminished in value by the construction of lock and dam "Number 12" in at least the sum of ten thousand dollars ($10,000.00), claimed in the petition, but the court held that the recovery was limited to the destruction of the water power afforded by the mill site and milldam. The court below in its findings of law and fact, says:

> 4th. "That *by reason of the erection of the lock and dam the mill can no longer be driven by water power. The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the milldam, which prevents the drop in the current which is necessary to run the mill.* The property is not otherwise injured by the lock and dam.
>
> 5th. "No part of the land or mill is overflowed or covered by a pool stage of water; nor is the mill physically damaged thereby.
>
> 6th. "Miller's Creek is not a navigable stream.
>
> 7th. "The mill and store were not abandoned for lack of business before the completion of the lock and dam. The store was put out of business by the construction of the dam and suspension of the mill. But the business of the mill and store had fallen off before the construction thereof and without reference to it.
>
> 8th. "The land has not been enhanced in value by the construction of the lock and dam.

9th. "*The damages* sustained by the owners of the mill *by reason of cutting off the water power* I place at $1,500. The record contains very little evidence from which I can determine the real extent of such damages, and I can not see my way clear to place it at any greater sum. This does not include anything on account of the store, as I do not consider that a proper element of recovery. It represents the depreciation of the valuation of the mill property by cutting off the water power.

"Judgment should be entered for $1,500." (Record, page 7.)

Thereupon judgment in favor of the plaintiffs was duly entered for this sum, with interest and costs as provided by law (Record, page 9).

To reverse this judgment this writ of error was prosecuted to this court. The assignment of errors filed contains nine paragraphs, each of which is supposed to assign the commission of a distinct error on the part of the court below (Record, pages 10 and 11). A careful analysis of the assignment of errors discloses that it contains a mere repetition in a slightly different form of the only two errors alleged to exist: *First*, that there was no physical invasion of plaintiffs' property, and therefore no taking within the meaning of the Fifth Amendment of the Constitution. *Second*, that the damages are purely consequential, speculative and remote, and the injury one for which no recovery can be had under the Tucker Act.

ARGUMENT.

The court below has found as a fact, that the milldam belonging to the defendants in error, is so completely submerged by the pool of still or slack water extending above lock and dam Number 12, that it is covered at all times to withn one foot of the crest of the milldam, and that the water power afforded by the milldam is completely cut off and destroyed. It is true that the court found as a fact, that the mill itself was not physically damaged, but it is evident that in the use of this language, the court merely referred to the mill house and the machinery used for grinding contained in the mill, as severable from the water wheel and milldam by which the water power is applied and furnished, and which in combination constitute the water power, which the court finds has been entirely destroyed. The court by its findings, has fixed the value of this submerged dam, in terms of the value of the water power supplied by it, at the sum of $1,500.

We think it must be clear that there has been a physical invasion of the property of these defendants in error, if it be conceded that the milldam and mill site were the private property of the defendants in error. We earnestly insist that this is property, and in itself constitutes a part of the realty owned by the defendants in error. The deed and findings of fact of the court below, show beyond controversy, that the defendants in error owned not merely the land upon which the mill was situated, but also the milldam and mill seat and other

improvements, together with all the rights, privileges and appurtenances belonging to the property. The word mill seat, or its modern synonym, mill site, includes the privilege, in the nature of a franchise, of operating the mill, and includes not only the land occupied by the mill itself, but so much as is necessary for the purpose of operating it (27 Cyc. 510).

In Kentucky, this privilege or franchise could only be acquired by the riparian owner, where the title to the bed of the stream was either in such riparian owner or in the Commonwealth, since the Act of 1797. By the Act of 1797, a riparian owner who desired to establish a grist mill, was empowered to invoke the power of eminent domain for the purpose of establishing a grist mill on his lands. This law contained full and complete provisions for the condemnation of lands above and below, and for the payment to the owners of the lands taken by the applicant to establish a mill, and regulated the toll which might be charged by the owner or operator of such a water mill. By a later act this power was extended to other mills and manufactories useful to the public, and the law in force at the time the mill in controversy was erected, and at the time the defendants in error and their ancestor, through whom they derived title, became the owners of it, was as follows:

> Sec. 1. "A person owning lands on a water course, the bed whereof belongs to him or the Commonwealth, and desiring to build on such lands a grist mill or other mill for manufactory, useful to the public, and needing a dam in or across the water course

or the raising of an established dam, or the cutting or enlarging of a canal, above or below, may by a petition, in writing, filed in the County Court, in which is situate the principal part of the land asked to be condemned, obtain therefrom a writ of *ad quod damnum*, for the purpose of obtaining the necessary condemnation, which shall embrace all the land demanded, whether lying in the same county or not.

* * * Sec. 9. "The applicant to whom such leave may be granted, shall upon paying the several parties entitled thereto compensation ascertained by judgment of the court, or upon paying the same into court for their use, become vested with the fee simple to the land so designated by the inquest and judgment, have a writ of possession therefor and otherwise proceed according to such leave."

2d Revised Statutes (Ky.), page 180.

The Tenth and Thirteenth Sections of the law as it appears in the Revised Statutes, fixed the amount of tolls which could be charged by the operator of a water mill, with penalties for violation of any of the provisions of the law including forfeiture of the mill privilege and of title to the property condemned. We have only cited such of the provisions as serve to shed some light upon the question of ownership of the property and the extent and nature of the estate in it. This being the law as it stood in Kentucky at the time this mill was erected and at the time it was conveyed by deed to the ancestor of the defendants in error, would seem to establish that these defendants in error are the owners not merely of the mill and mill site, but of the bed of the stream itself, since at the time of the application to establish the mill, the law required the applicant either to be the owner of

the bed of the stream or to acquire it from the Commonwealth.

The court has found as a matter of fact, that Miller's Creek is not a navigable stream. It was therefore not navigable even to the most limited extent or within the broadest meaning which can be given to the word "navigable." It was in no sense a public, natural highway, or capable of being used as such. It is well-settled law in Kentucky, that the owner of land through which runs a non-navigable stream, is the owner both of the stream and the bed of the stream itself. As early as 1802, the Court of Appeals of Kentucky, in construing the Act of 1797, said:

> "But if the court should be mistaken in their construction of the act of assembly respecting mills, still, it is manifest, from an inspection of the record, that the law has not been pursued, inasmuch as the record does not show that the property in the bed of the branch was in the Commonwealth, or in the applicant, without which the County Court ought not to have given leave to erect the mill."
>
> *O'Bannon* v. *Jackson*, 2 Ky. (Sneed) 201-2.

In the case of *Murray* v. *Preston*, which was an action to enjoin the obstruction of a small creek by water gaps and a milldam erected by the riparian owner, the injunction was granted by the lower court, and its judgment was reversed by the Court of Appeals. In this case the stream in controversy had been declared a navigable stream by Act of the Legislature of Kentucky.

In this opinion the Court of Appeals said:

"The first question is, what is the effect of the Act of the Legislature declaring this creek a navigable stream?

"The Constitution of the State forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed, it was the private property of the owners of the adjoining lands. If it was the private property of the appellant, within the boundary of his land, the Legislature could not divest him of his rights by simply calling it a navigable stream when it was not one in fact. The rule on this subject is thus stated in Cooley on Constitutional Limitations (side page 591).

"The question, what is a navigable stream, would seem to be a mixed question of law and fact; and though it is said that the Legislature of the State may determine whether a stream shall be considered a public highway or not, yet, if in fact it is not one, the Legislature can not make it so by simple declaration, since, if it is private property, the Legislature can not appropriate it to a public use without providing for compensation."

Murray v. *Preston,* 106 Ky. 561.

And continuing, the court in conclusion says:

"Upon the principle that the water is the highway, there can be no highway if the quantity of water is insufficient for its reasonable use for this purpose in ordinary stages of high water. The quantity of water in this creek, its width, its use, and the length of time it remained up in time of freshets, all show that it is only what is commonly known as a 'brook' or 'branch,' and as such was the private property of the appellant."

Ibid. 106 Ky. 166.

It must be evident therefore that the defendants in error and their predecessors in title for more than fifty years, have been the owners of this property, and that they own not merely the land on both sides of Miller's Creek, as shown by the deed, but as such riparian owners own the stream and its bed, including the milldam which was submerged and destroyed as to both its use and value. It was their private property, and there is nothing in this record which even intimates that the United States asserts or has sought to assert any claim of title to it. The findings of fact show that Miller's Creek is not a navigable stream, and this property is located some distance from the river and in no place borders upon the Kentucky River.

The jurisdiction of the United States over the Kentucky River itself, so far as any proprietary right on the part of the Government is concerned, was derived solely from an act of cession by the General Assembly of Kentucky, approved January 24, 1880, which is as follows:

"CHAPTER 58.

"AN ACT to grant the consent of the State of Kentucky to the acquisition by the United States of certain lands within the State, and bordering on the navigable rivers thereof, for the purpose of constructing canals, or of erecting thereon dams, abutments, locks, lock-keepers' dwellings, offices, and all necessary structures for the construction and maintenance of slack-water navigation on said rivers, and ceding jurisdiction over the same, and for imposing fines and penalties for willful injuries to the grounds, buildings, and appurtenances acquired under the provisions of this act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky, and it is hereby enacted by the authority of the same:

"Sec. 1. That whenever the United States shall make an appropriation, and shall be about to begin the improvement of any of the navigable rivers within or bordering on the State of Kentucky, by means of locks and permanent or movable dams, or dams with adjustable chutes, or by means of a canal, the consent of the State of Kentucky is hereby given to the acquisition by the United States by purchase or by condemnation of any lands, buildings, or other property necessary for the purpose of erecting thereon dams, abutments, locks, lock-keepers' dwellings, chutes, and other necessary structures for the construction and maintenance of slack-water navigation on said rivers, or for the purpose of constructing canals on the same; and the said United States shall have, hold, use and occupy the said land or lands, buildings or other property, when purchased or acquired as provided for by this act, and shall exercise jurisdiction and control over the same concurrently with the State of Kentucky.

"Sec. 2. *Be it further enacted,* That in case of failure of the United States to agree with the owner or owners of any such lands as the United States may deem necessary for the purposes named in the first section of this act, it shall be lawful for the United States to apply for the condemnation of such land by petition to any judge of a court of record in or nearest to the county where the land may be situated, either in term time or in vacation, notice of the time and place of such application having been first duly given, by publication for thirty days prior to the day of such application, in some newspaper of general circulation published in the county where the land lies, or if the owner or owners reside in the State of Kentucky, by personal service upon the owner or owners of such land at least twenty days prior to

such application; and thereupon it shall be lawful for such judge to appoint three disinterested freeholders of the county where such land lies as commissioners, and having been first duly sworn to well and duly appraise the damages due the owner or owners of said land proposed to be taken, shall report, in writing, to the said judge the amount of damages to be paid to the owner or owners of such land, which report, upon confirmation by said judge, shall be held as final and binding upon said owner or owners of said land; and upon the amount of such damages being paid to the owner or owners of said land, the title of such land shall vest in the United States, and said land shall be exempt from all taxes and assessments so long as it shall remain the property of the United States.

"Sec. 3. *And be it further enacted,* That if any person or persons shall willfully or maliciously injure any of the lands, buildings, or other property acquired or held under the provisions of this act, such person or persons shall be liable to a fine of not less than twenty dollars, and to an imprisonment not exceeding six months, or both or either, at the discretion of the court. Said offense to be prosecuted in any court of competent jurisdiction.

"Sec. 4. And for the purpose of enabling the United States to expend the one hundred thousand dollars already appropriated by Congress for the improvement of the Kentucky River, and any further appropriations that may hereafter be made for that purpose, the State of Kentucky hereby transfers and cedes to the United States the five locks and dams heretofore constructed by said State on said river, together with all the grounds and appurtenances belonging to the same; but this transfer and cession is made subject to the lease and privileges heretofore made and granted by said State to the Kentucky River Mills Company, at lock and dam No. 4 on said river; and the provisions of the preceding section

of this act as to the concurrent jurisdiction of said State and the United States over the lands and buildings authorized to be acquired and constructed by said sections, and imposing penalties for injuries to said works, shall extend and apply to the said five locks and dams and their appurtenances hereby transferred and ceded to the United States.

"Sec. 5. This act shall take effect and be in force from its passage.

"Approved January 24, 1880."

Laws of Kentucky, 1879, Vol. 2, page 8, Ch. 58.

The Kentucky River is an inland stream lying wholly as to every drop of its waters, within the borders of the Commonwealth of Kentucky, and many years prior to the act of cession above quoted, had been improved for purposes of navigation by the State of Kentucky. The State had erected five locks and dams in the river, which were expressly ceded by this act to the United States. By the terms of this act of cession, the United States acquired title only to the property actually ceded and actually owned by the Commonwealth of Kentucky, and can not be held to have acquired any paramount title to the private property of the riparian owners of the small streams which are tributary to the river. This, it could only acquire against the will of such owners, by the exercise of the power of eminent domain.

WAS THE DESTRUCTION, BY SUBMERSION, OF THE MILLDAM AND THE CONSEQUENT DESTRUCTION OF THE WATER POWER A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE, WITHIN THE MEANING OF THE FIFTH AMENDMENT?

This record and the findings of facts show conclusively that the private property of these defendants in error has been destroyed by the acts of the officers and agents of the United States, acting under authority of acts of Congress. There can be no question that there has been an actual physical invasion of their property by flooding it to such an extent that their milldam is almost entirely submerged at all times, and its use and value entirely destroyed. It is equally beyond dispute that the government makes no claim of title to the property or any part of it. An examination of the decisions of this court, will demonstrate that such action constitutes a taking within the meaning of the Fifth Amendment. The leading case upon this subject is *Pumpelly* v. *Green Bay Canal Company*, reported in 13 Wallace, page 166, which was an action for damages caused by the improvement of Fox River, a navigable stream, and which involved the construction of a provision of the Constitution of Wisconsin, which this court in the opinion by *Mr. Justice* Miller, says was in almost identical language with the provisions of the Fifth Amendment. In this case, this court said:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government has a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that *if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation,* because, in the narrowest sense of that word, it is not taken for public use. *Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law,* instead of the government, *and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.*"

In this case the court cited with approval *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129, in which Dayton, Judge, said:

"That this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably con-

nected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

Continuing, the court cites with approval the decision of *Chancellor* Kent in the case of Gardner v. Newburgh, 2 Johns, Ch., 162, in which the learned Chancellor held that the diversion of water from plaintiff's lands was a taking for public use.

These cases were decided in the absence of any express provision of the Constitution of either of the States in which they arose, and this court then in the opinion above quoted, proceeded as follows:

> "If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the *Constitution, it would become an instrument of oppression rather than protection to individual rights.*
>
> "But there are *numerous authorities* to sustain the doctrine that a *serious interruption to the common and necessary use* of property *may be*, in the language of Mr. Angell, in his work on water courses, *equivalent to the taking of it*, and that under the constitutional provisions *it is not necessary that the land should be absolutely taken.* Ang. Wat., Sec. 465-a; *Hooker* v. *N. Haven and Northhampton Co.*, 14 Conn. 146; *Rowe* v. *Granite Bridge Co.*, 21 Pick. 344; *Canal Appraisers* v. *People*, 17 Wend. 604; *Lackland* v. *North Mo. R. R. Co.*, 31 Mo. 180; *Stevens* v. *Prop. of Middlesex Can.*, 12 Mass. 466. * * *
>
> "* * * We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from

the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that *it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material,* or by having any artificial structure placed on it, so *as to effectually destroy or impair its usefulness, it is a taking* within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." *Pumpelly* v. *Greenbay Canal Co.,* 13 Wallace, 560-561.

The case of *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, was an action for the value of certain locks and dams owned by the plaintiff, and erected under authority of acts of the Legislature of Pennsylvania in the Monongahela River, and which were appropriated under acts of Congress. In the opinion of this court in that case, *Mr. Justice Brewer,* after a review of the authorities, says:

"In this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by *Mr. Justice* Bradley, for the court,

in *Boyd* v. *United States,* 116 U. S. 616, 635 (29, 746, 752): 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be *obsta principiis.*'' *Monogahela Navigation Co.* v. *United States,* 148 U. S. 325.

And again after asserting the power of Congress to take the property involved in that action, under the power to regulate commerce, this court in the case just quoted, said:

> ''But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. *The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads;* but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. * * *

"Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of *the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken.*" *Ibid.* 148 U. S. 336, 337.

In the case at bar, the mill and milldam were erected on a non-navigable stream, under authority granted by the Commonwealth of Kentucky. The right to establish and operate a mill is in the nature of a franchise, and the law establishes the toll which may be taken. It is now, and has been from the very inception of the Commonwealth, regarded as a public utility, with the right to invoke, on behalf of the riparian owner, the exercise of the power of eminent domain, in order to establish such a mill and secure a mill privilege or franchise. The mill with its dam and appurtenances was real estate and the franchise to take toll of grain ground by it was a vested property right, which could no more be taken without just compensation than the land or dwelling

house of these defendants in error. The opinion in the case last quoted continues as follows:

> "The theory of the government seems to be that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the government in the exercise of its supreme power assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. *The franchise is a vested right. The State has the power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual.* * * *
>
> "The *power which Congress possesses* in respect to this taking of property *springs from the grant of power to regulate commerce,* and *the regulation of commerce implies as much control, as far-reaching power,* over an *artificial* as over a *natural* highway They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads, constructed under the authority of the States, and the improvement of natural highways

carried on by the general government, that at first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the State or private individuals."

Ibid. 148 U. S. 341, 342.

In the instant case the reasoning of the court in the case just cited, applies with even greater force, for here the property taken is on a stream which is not navigable in any sense of the word, and as far as this record discloses, is absolutely incapable of being made navigable. It is in no sense a natural highway by water, and is incapable of being made navigable except by purely artificial means.

This court in a number of subsequent cases, has approved the doctrine laid down in the cases we have cited. The fullest and latest decision of this court, in which all of the earlier cases are reviewed and harmonized or distinguished, is the case of the *United States* v. *Lynah,* 188 U. S. 446. It was a suit to recover for land taken by flooding, as an incident to the improvement of navigation in the Savannah River, under acts of Congress. This case is directly in point, and Mr. Justice Brewer in the opinion of the court after a careful review of authorities, says:

"*It is clear from these authorities that where the government by the construction of a dam* or other public works *so floods lands belonging* to an individual *as to substantially destroy their value*

there is a taking within the scope of the Fifth Amendment. While the government *does not* directly proceed to *appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested.*"

United States v. *Lynah*, 188 U. S. 470.

And again in discussing the question of consequential damages, the court in that case said:

> "Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. But *if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.*"
>
> *Ibid.* 188 U. S. 471.

The court in that case held that the lands must be regarded as taken and irreclaimable, saying in conclusion:

> "Here there is no finding, no suggestion, that by any expense the flooding could be averted. We may, of course, know that there is theoretically no limit to that which engineering skill may accomplish. We know that vast tracts have in different parts of the world been reclaimed by levees and other works, and so we may believe that this flooding may be prevented, that some day all these submerged lands may

be reclaimed. But as a practical matter, and for the purposes of this case, we must, under the findings, regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.

"Therefore, following the *settled law of this court*, we hold that *there has been a taking of the lands for public uses*, and that the government is under *an implied contract to make just compensation therefor.*"

Ibid. 188 U. S. 474.

In the case at bar there is not the slightest intimation that the flooding of the milldam and the consequent destruction of the water power, can by any skill or expense be obviated. The dam, by its submersion, is as entirely destroyed as to its only use or value, as if it had been removed or annihilated. There is no suggestion in this record as to any use or value it may have in its present condition. The findings show that it is utterly destroyed, and therefore taken in the light of these authorities. There is no question presented here of consequential damages. No damages whatever are allowed by the court below in its findings of fact and law for injury to the residue of the property, which the court held was not physically damaged. The findings of the court below were expressly limited to the actual value of that portion of the property which was entirely destroyed, and while we insisted that the proper measure of damages was the difference in value of the entire property just after it was flooded and just before it became known that it would be so flooded, there was no application on behalf of defendants in error for a writ of error or appeal,

and they stand upon the judgment of the trial court for the amount awarded to them for the property which was physically invaded and utterly destroyed.

THIS ACTION DOES NOT SOUND IN TORT.

This court has so often held that cases presenting a similar state of facts to that presented by this record do not "sound in tort" that we deem it necessary to cite but two cases, which, with those already cited, seem to settle this question in favor of our contention. In the case of the *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, *Mr. Justice* Harlan, for the court, says:

> "The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims, of actions found upon any contract, express or implied, with the Government of the United States."
>
> *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 657 (28 Law Ed. 850).

The case of *United States* v. *Welch*, 217 U. S. 333, was an action for damages for flooding land, and the principal element of damage was the taking, by flooding, of a private right of way leading from the plaintiff's lands over the lands of another to the county road. (The damage complained of was caused by the construction of

lock and dam Number 10 in the Kentucky River.) The value of this easement was fixed by the court in his findings, at seventeen hundred dollars ($1,700), and this court held:

> "The petition, like the form of finding, lends some countenance to this contention, by laying emphasis on the damage to the farm, although it is to be noted that, even in this aspect, the damage is to the tract of which a part is taken. 191 U. S. 354. But both petition and finding in substance show clearly that the way has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. Miller v. Horton, 152 Mass. 540, 547, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner; and the value of the easement can not be ascertained without reference to the dominant estate to which it was attached. *The argument is only confused by reference to cases like Gibson* v. *United States,* 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. Rep. 578; *Harvard College* v. *Stears,* 15 Gray, 1; *Smith* v. *Boston,* 7 Cush. 254, etc., where it was held, although there are decisions the other way, that a landowner can not recover for the obstruction of a public water course, the discontinuance of a public way, or the like. *The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the*

rest of the public, is the same in kind. Here there is *no question* of the *plaintiff's private right.*"

United States v. *Welch*, 217 U. S. 338, 339 (54 L. Ed. 789, 790).

In view of the language of the court above quoted, we have deemed it inadvisable to discuss or distinguish cases like those mentioned in this decision.

These cases and others of like import which have been so often explained and distinguished in the decisions of this court in cases like the one here presented, were cited and relied upon by counsel for plaintiff in error, in the court below. This court by the decision which we have last quoted has placed its ban of disapproval upon their citation.

We earnestly insist that the milldam and mill site form a part of the real estate of the defendants in error, and although the court says: "No part of the land or mill is overflowed or covered by a pool stage of water," the findings of fact taken together show that the word "land," as used in this connection in the "fifth" finding of fact, is used in its *ordinary* and not in its *legal* sense. The findings of fact show conclusively that the milldam and the bed of the stream below it are entirely submerged, and that the only value of the dam, namely, the water power afforded by it, is entirely cut off and destroyed.

The doctrine that there may be a partial taking which will entitle the landowner to compensation *pro tanto*, is so well established by decisions of this court, and is so clearly sustained by this last case above quoted, that we have deemed it needless to cite other authorities.

COSTS.

In our statement of the questions of law presented by the assignment of errors, we failed to notice the alleged error set out in the assignment numbered "Seventh," namely:

> "The court erred in adjudging that the defendant is liable for any costs incurred. Since the repeal by the Judicial Code of Section 15 of the Tucker Act there is no provision of law for allowance of costs against the United States in actions under said act." (Record, page 11.)

We refrained from discussing this question because we felt that counsel for the defendant below overlooked the fact, that while Section 15 of the Tucker Act was repealed by Section 297 of the Judicial Code, it was expressly re-enacted without change in *ipsissimis verbis,* as Section 152 of the Judicial Code:

> "Sec. 152. (*Costs may be allowed prevailing party.*) If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. (36 Stat. L. 1138.)"

The Act of March 3, 1911, Chapter 231, titled "The Judicial Code," was an act to *codify, revise and amend the laws relating to the judiciary,* as shown by the enacting clause and as appears from the provisions of the act itself. The law allowing costs as against the United

States remains as it was before the passage of the act, in the discretion of the trial court. The court below by its judgment adjudged costs "to be taxed by the clerk in accordance with the provisions of the statute in such cases made and provided." (Record, page 9.)

Even had Section 152 of the judicial Code been omitted, the judgment in this form would not be reversible error, for if no costs are allowed by the statute, none are allowed by the judgment.

We earnestly submit that we have demonstrated from this record that the private property of these defendants in error has been taken for public uses within the meaning of the Fifth Amendment to the Constitution. The findings of fact show that only the value of the property actually taken or destroyed, has been allowed in damages, and it follows therefore, that this action is upon an implied contract to make compensation and not an action sounding in tort.

Believing that we have demonstrated that there is no error shown in this record, we submit this cause in the confident hope that the judgment of the lower court will be affirmed.

Respectfully submitted,

J. F. WINN,

For Defendants in Error.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, PLAINTIFF IN ERROR,

versus

ACHILLES KELLY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

J. F. WINN,
For Defendants in Error.

WESTERFIELD-BOOTH CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, - - - - *Plaintiff in Error,*

versus

ACHILLES KELLY, ET AL., - - *Defendants in Error.*

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

We crave the indulgence of the court to a response, to the brief for the Government, by a supplemental brief, because the original brief for defendants in error was prepared and printed before we had any opportunity of seeing the brief for the Government filed by the Assistant Attorney-General, Mr. Huston Thompson. We could not, of course, anticipate the novel contentions of counsel, the legal effect of which is:

(1) That a milldam of solid masonry on a small non-navigable stream is merely an easement; and

(2) That the natural channel of a non-navigable stream forms a part of the bed or natural channel of the river of which it is a tributary, no matter how far it may be situated from the point of confluence.

It would seem that the mere statement of these astounding propositions would afford their refutation.

As to the first proposition, the findings of fact show that the milldam is submerged to within one foot of its crest when water is at pool level above Lock and Dam No. 12—a condition that can only exist when there is no flow of water whatever in the river. This condition has not existed in the Kentucky River since this lock and dam was built and for nearly the entire time of each year the water at ordinary stage completely covers the submerged dam, including its crest, as shown by the evidence. Not only is the dam completely submerged, but the necessary and unavoidable consequence of its submersion is, that the water power afforded by it and which constitutes its only use and value, is entirely cut off and destroyed as shown by the findings of fact. The milldam is a structure of masonry, built upon land, and as such structure is *"land"* as much as a dwelling or any other structure which forms a part of the real estate it occupies. The court has found its value in terms of the water power afforded by it. The court has found that the defendants own not merely the land upon which the mill is situated, but the mill and mill-site, including the right of backing the water above the milldam upon the lands above and of free and uninterrupted flowage of water below in the natural bed and channel of the creek. It was for this real property which was physically invaded and destroyed as well as the appurtenant easement for which the damages fixed by the trial court were allowed. That such a structure is real estate presents a proposition so

elementary as not to admit the citation of authority. (See *Cyc.*, 27, 510, 511.)

The second proposition that the United States, having, taken control of a navigable stream, and, undertaken its improvement for purposes of navigation, must be held to have thereby acquired proprietary rights superior to the private rights of the riparian owners of such small, navigable streams as are tributaries to it, is so astounding, it would seem only necessary to say, that carried to its logical conclusion, such contention would place not merely the entire valley of the river but the entire watershed of a navigable river under the control of Congress to such an extent, that every acre of land in the watershed might be taken by the United States without liability on the part of the Government to make compensation.

The *superior or dominant right of the Government over the waters of a navigable stream ends with the natural banks and channels of the river.* The banks remain where nature has placed them and can not be changed by legislation so as to affect private rights of ownership without making just compensation as required by the Fifth Amendment. (See *United States* v. *Jackson*, 230 U. S. 1; *United States* v. *Hughes*, 230 U. S. 24; *Hooper* v. *Hobson*, 57 Me. 273, 99 Am. Dec. 770; *Murray* v. *Preston*, 106 Ky. 561.)

This question was discussed by this court in the late case of *Cubbins* v. *Mississippi River Com.* (241 U. S. 351). The court in that case, *Mr. Chief Justice* White writing, says:

"That view would be here irrelevant, since there is no suggestion of any bed of the river in high or low water except the space between the natural banks along which the levees were built, unless the whole valley be considered as such bed. Indeed from the face of the bill it is apparent, that the rights relied upon were assumed to exist upon the theory, that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads—some of them trans-continental—are virtually to be considered from a legal point of view as constituting merely the high-water bed of the river, and therefore subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks."

Continuing, the court says:

"Additionally, when the principle laid down in the Jackson case is illustrated by the ruling which was made in the Hughes case, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the Hughes case have been made except upon the theory that the bank of the river was where it was found, and did not extend over a vast and imaginary area." (241 U. S. 368, 60 L. Ed. 1049.)

The contention of counsel in the case just quoted and that of counsel in the instant case, grow out of the confusion which arises from attempts on the part of counsel to apply the rules of the common law applicable to the ownership of property situated on navigable waters as there understood, *i. e.*, "where the tide ebbs and flows"

to inland streams where they can have no just application. In the one case the tides are subject to fixed laws; and "mean high-water marks" can be easily established. In the other, there can, in the very nature of things, be no established "mean high-water mark," as the floods in such rivers are governed by no law save such as are both unknown and unknowable.

In the case of *The United States* v. *Grizzard*, 219 U. S. 180, the contention on behalf of the Government was that the easement of access destroyed and therefore taken, did not constitute property for which compensation could be required, but the court after distinguishing that case from the cases cited in support of the contention, said:

> "But here there has been an *actual taking by permanently flooding a part of the farm* of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract, and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case." (*Ibid.* 219 U. S. 183.)

And continuing the opinion of this court in that case, citing with approval the case of *United States* v. *Welch*, 217 U. S. 333, says:

> "Both the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken.

"That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was $1,500, when the value of the entire place before the taking was $3,000. A judgment for a less sum will not be that 'just compensation' to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice." *Ibid.* 219 U. S. 185-6.

In the case at bar, not only is the milldam submerged but the water rights and mill privilege are also destroyed. These cases with those cited in our original brief would seem to make it unnecessary to refer to the authorities cited by counsel for the Government. When the latter authorities are analyzed, they demonstrate that there was no physical invasion of any private property in any of them, and, that they were cases of mere interference with, or interruption of, the private right of access to navigability, or claims for damage growing out of mere *riparian rights* of ownership *in submerged land in the bed of navigable waters.* The distinction between such claims and that presented by the instant case is clearly drawn by this court in the case of *Scranton* v. *Wheeler,* 179 U. S. 141.

This was an action to require the removal of structures erected on submerged land which impaired the plaintiff's right of access to navigation, or for compensation, and this court held that the question of title of the riparian owner was determined by the laws of the State of Michigan in which the property in controversy was situated. In the opinion in that case *Mr. Justice* Harlan, for the court, said:

> "Whatever the nature of the *interest* of a riparian *owner in the submerged lands* in front of his upland bordering on a public navigable water, his *title is not as full and complete as his* title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, *not at his absolute disposal, as is his upland,* but to be held at all times *subordinate to such use of the submerged lands and of the waters flowing over them* as may be consistent with or demanded by the *public right of navigation.*" 179 U. S. 163.

Manigault v. *Spring,* 199 U. S. 473, was a suit to enjoin the erection of a dam in Kinlock Creek, a tributary of the Santee River in South Carolina on the ground that Kinlock Creek was a navigable stream and that the dam interfered with plaintiff's right of access to his land and necessitated the raising of dykes on Minim Creek on the opposite side of the river to prevent overflow of his land. The court overruled the motion for injunction and this court affirmed the decision, and discussing the authorities, says:

> "We think *the rule* to be gathered from these cases *is that where there is a practical destruction or material impairment of the value of plaintiff's*

lands, there is a taking which demands compensation." Ibid. 199 U. S. 484.

The court in the case last cited, after referring to *Gibson* v. *United States,* 166 U. S. 269, distinguishes it from the cases we have cited and throws additional light upon the decision in that case. Gibson v. United States was a case in which the court said there was no physical invasion of the plaintiff's property but that the construction of piers on submerged land in front of her property made her access to navigability more inconvenient. There was no flooding of her land and the court held that the damage was purely consequential.

Bedford v. *United States,* 192 U. S. 217, was a case of alleged damage by erosion caused by the erection of a revetment on the Mississippi River which did not change the course of the river. The damage claimed was for gradual erosion of land and the court held that there was no taking and no actual invasion of the premises.

Jackson v. *United States,* 230 U. S. 1, was a case in which the Government had constructed a levy to prevent overflow from the Mississippi River where its right to do so was unquestionable and the damage complained of resulted from the failure on the part of the Government to construct levees at other places on the river, which the Government was under no legal duty to do, and the court held that for such damage there could be no recovery.

Hughes v. *United States,* 230 U. S. 24, was a case where the Government in conjunction with the local au-

thorities had constructed a new levee several miles back from the bank of the Mississippi River in the rear of the property claimed to be damaged for the two-fold purpose of improving navigation and of preventing damage to vast areas of property beyond the levee from unusual and accidental floods in the Mississippi River and had failed to construct levees or strengthen those already existing on the river banks in front of the property. The new levees were several miles in the rear of the Timberlake plantation, the property claimed to have been damaged, and nowhere came in physical contact with it. The contention was that by the erection of this new levee the Government had changed the channel of the river and thrown the whole of this plantation in the bed of the stream. The court in that case held that the bed of the stream was unchanged and remained within its natural banks as before the construction of the levee and that there was no liability on the part of the Government under such a state of facts to make compensation.

Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U. S. 251, was a case in which the plaintiff had constructed a log pool formed by piers on fills extending into navigable waters (outside or harbor lines as they then existed and had been theretofore established by the Secretary of War) and a wharf connecting the ends of these piers or fills. The harbor lines were afterwards extended by the Secretary of War which required the removal of these structures, the resultant injury was held to be one for which no compensation could be had on the ground that the right to *place obstructions in the bed of navigable*

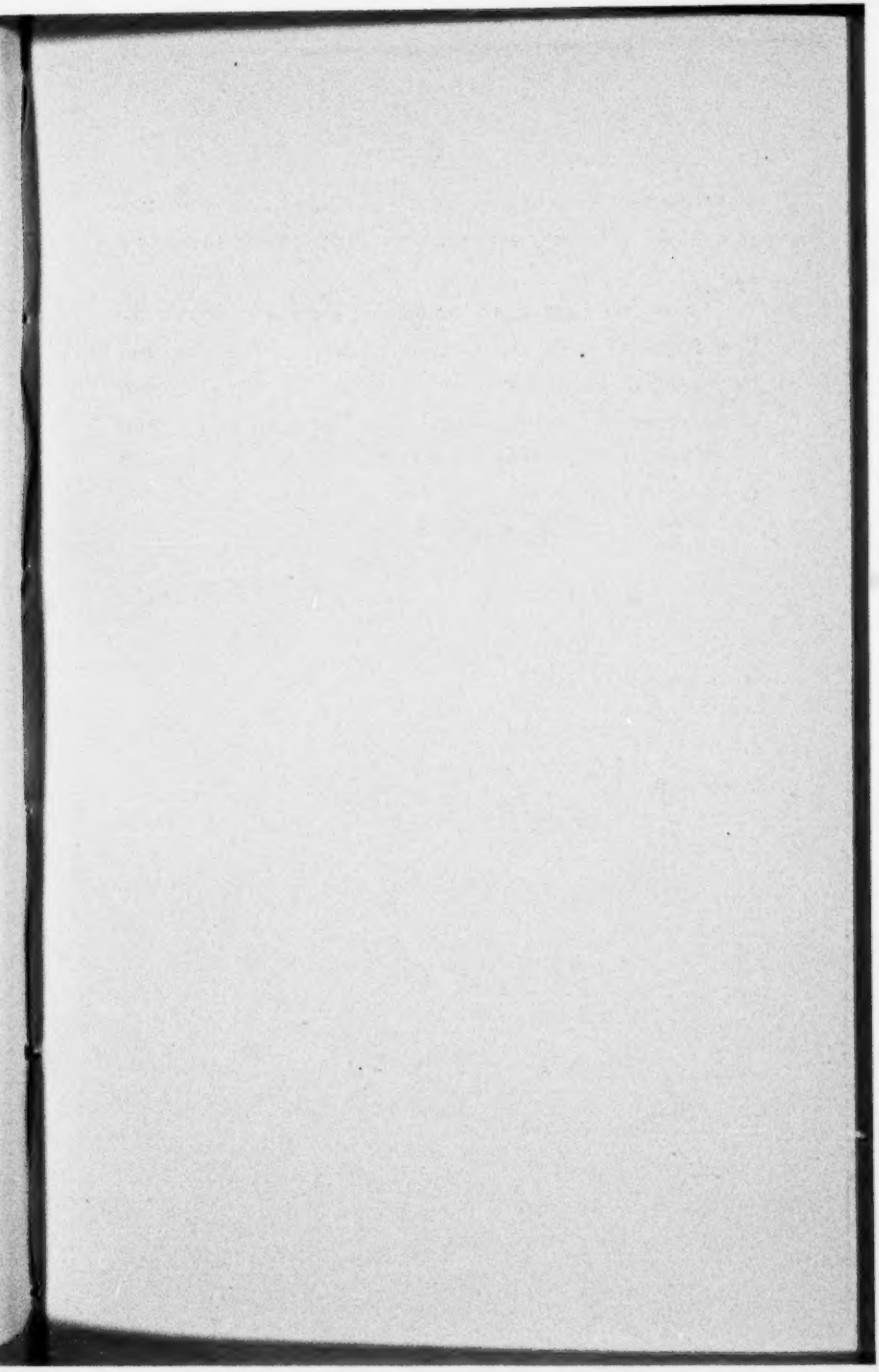
waters was not an *absolute* but a *qualified right* and *subject to the dominant and superior right of public navigation.*

We believe that all the cases cited in the brief for the Government, when analyzed and distinguished as they have been by this court, will be found authorities in favor of our contention and certainly do not support in any case cited the contention of counsel for plaintiff in error in the instant case.

Respectfully submitted,

J. F. WINN,

For Defendants in Error.



UNITED STATES *v.* CRESS.

UNITED STATES *v.* KELLY ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Nos. 84, 718. Argued December 13, 1916.—Decided March 12, 1917.

The servitude to the interests of navigation of privately owned lands forming the banks and bed of a stream is a natural servitude, confined to such streams as in their ordinary and natural condition are susceptible of valuable public use in navigation, and confined to the natural condition of such streams.

When navigable streams affording ways of commerce between States are improved by the federal government by means of locks and dams which raise the water above its natural level, the streams as thus improved remain navigable waters of the United States for all purposes of federal jurisdiction and regulation.

The power of the federal government to improve navigable streams in the interest of interstate and foreign commerce must be exercised, when private property is taken, in subordination to the Fifth Amendment.

In improving the navigation of the Cumberland River, in Kentucky, under the commerce power, the federal government by means of a lock and dam raised the water above the natural level so that lands on a non-navigable tributary, not normally invaded thereby, were subjected permanently to periodical overflows substantially injuring, though not destroying, their value. *Held*, in an action for damages under § 24 of the Judicial Code (derived from the Tucker Act):

(1) That this amounted to a partial taking of the property.

(2) That the United States was liable *ex contractu* to compensate the owner to the extent of the injury.

(3) That, upon payment, the United States would acquire an easement to overflow the land as often as would necessarily result from the use of the lock and dam for navigation, the fee, however, remaining in the private owner.

(4) That the riparian owner also was entitled to compensation for impairment of the value of his land caused by the destruction of a

ford over the tributary used in connection with a private way appurtenant to the land.

A like improvement of the Kentucky River, in Kentucky, by raising its water above natural level raised in like manner the water in a non-navigable tributary on which were a privately owned mill and mill-site, thus ending the usefulness of the mill by doing away with the head of water necessary to run it. *Held*, that the mill-owner, to whom also, under the law of Kentucky, belonged the bed of the tributary with the right to have the water flow there free from artificial obstruction, was entitled *ex contractu* to recover from the United States an amount equal to the depreciation of the mill property resulting from the loss of water-power.

The right to have the water of a non-navigable stream flow away from riparian land without artificial obstruction is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land itself.

Section 152 of the Judicial Code, permitting costs against the United States in claims cases, although appearing in the chapter entitled "The Court of Claims," is not confined to cases in that court but applies also when the District Court is exercising concurrent jurisdiction under § 24. This conclusion results from a consideration of the Tucker Act, of March 3, 1887, c. 359, 24 Stat. 505, and §§ 294 and 295 of the Code, read in connection with the repealing section, 297.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Thompson, with whom *Mr. P. M. Cox* and *Mr. Seth Shepard, Jr.*, were on the briefs, for the United States.

Mr. J. F. Winn for defendants in error in No. 718.

No appearance for defendant in error in No. 84.

MR. JUSTICE PITNEY delivered the opinion of the court.

These cases were argued together, involve similar questions, and may be disposed of in a single opinion. They were actions brought in the District Court by the respective defendants in error against the United States under

the 20th paragraph of § 24, Jud. Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093), to recover compensation for the taking of lands and water rights by means of back-water resulting from the construction and maintenance by the Government of certain locks and dams upon the Cumberland and Kentucky Rivers, respectively, in the State of Kentucky, in aid of the navigation upon those rivers.

In No. 84 the findings of the District Court are, in substance, that at the time of the erection of Lock and Dam No. 21 in the Cumberland River, the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of the Cumberland, not far distant from the river; that by reason of the erection of the lock and dam six and six-tenths acres of this land are subject to frequent overflows of water from the river, so as to depreciate it one-half of its value, and a ford across Whiteoak Creek and a part of a pass-way are destroyed; that the six and six-tenths acres were worth $990, and the damage thereto was $495; that the damage to the land by the destruction of the ford was $500; and that plaintiff was entitled to recover the sum of $995. It may be supposed that Whiteoak Creek was not a navigable stream, but there is no finding on the subject.

In No. 718 the findings are to the effect that at the time of the erection by the Government of Lock and Dam No. 12 in the Kentucky River the plaintiffs, together with another person who was joined as a defendant, were the owners and in possession of a tract of land situate on Miller's Creek, a branch of the Kentucky, containing five and one-half acres, upon which there were a mill and a mill seat; that by reason of the erection of the lock and dam the mill no longer can be driven by water power; that the water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, and this prevents the drop in the current that is necessary to run

the mill; that no part of the land or mill is overflowed or covered by pool stage of water, nor is the mill physically damaged thereby; that Miller's Creek is not a navigable stream; that the damages sustained by the owners of the mill, representing depreciation of the value of the mill property by cutting off the water power, amount to $1500.

Judgments were entered in favor of the respective land owners for the sums mentioned in the findings, together with interest and the costs of the suits, and the United States appealed to this court.

(1.) A fundamental contention made in behalf of the Government, and one that applies to both cases, is that the control by Congress, and the Secretary of War acting for it, over the navigation of the Cumberland and Kentucky Rivers, must also include control of their tributaries, and that in order to improve navigation at the places mentioned in the findings it was necessary to erect dams and back up the water, and the right to do this must include also the right to raise the water in the tributary streams.

In passing upon this contention we may assume, without however deciding, that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks.

The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 671; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce

among the States and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lattig*, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471).

The State of Kentucky, like most of the States of the Union, determines the navigability of her streams, so far as the public right is concerned, not by the common-law test of the ebb and flow of the tide—manifestly inapplicable in a State so wholly remote from the sea—but by the test of navigability in fact (*Thurman* v. *Morrison*, 53 Kentucky, [14 B. Mon.] 367 [2d ed. p. 296]; *Morrison* v. *Thurman*, 56 Kentucky, [17 B. Mon.] 249; *Goodin's Executors* v. *Kentucky Lumber Co.*, 90 Kentucky, 625; *Murray* v. *Preston*, 106 Kentucky, 561, 564; *Banks* v. *Frazier*, 111 Kentucky, 909, 912; *Ireland* v. *Bowman & Cockrell*, 130 Kentucky, 153, 161), while sustaining private ownership of the beds of her streams, both navigable and non-navigable, according to the common-law rule (*Berry* v. *Snyder*, 66 Kentucky, [3 Bush] 266, 273, 277; *Miller* v. *Hepburn*, 71 Kentucky, [8 Bush] 326, 331; *Williamsburg Boom Co.* v. *Smith*, 84 Kentucky, 372, 374; *Wilson* v. *Watson*, 141 Kentucky, 324, 327; *Robinson* v. *Wells*, 142 Kentucky, 800, 804), with incidental rights to the flow of the stream in its natural state (*Anderson* v. *Cincinnati Southern Railway*, 86 Kentucky, 44, 48).

The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right, is so fully established, and is so amply illustrated by recent decisions of this court, that a mere reference to the cases will suffice. *Scranton* v. *Wheeler*,

179 U. S. 141, 163; *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 634; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 62; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 85, 88; *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 268; *Willink* v. *United States*, 240 U. S. 572, 580.

But this rule, like every other, has its limits, and in the present cases, which require us to ascertain the dividing line between public and private right, it is important to inquire what are "navigable streams" within the meaning of the rule.

In Kentucky, and in other States that have rejected the common-law test of tidal flow and adopted the test of navigability in fact, while recognizing private ownership of the beds of navigable streams, numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right. Cases exemplifying these propositions are cited in a marginal note.[1] We have found no case to the

[1] *Wadsworth* v. *Smith*, 11 Me. 278, 281; *Brown* v. *Chadbourne*, 31 Me. 9, 21; *Treat* v. *Lord*, 42 Me. 552, 561–2; *Pearson* v. *Rolfe*, 76 Me. 380, 385; *Moore* v. *Sanborne*, 2 Mich. 519, 523–4; *Thunder Bay River Booming Co.* v. *Speechly*, 31 Mich. 336, 343, 345; *Witheral* v. *Muskegon Booming Co.*, 68 Mich. 48, 58–9; *Improvement Co.* v. *Lumber Co.*, 69 Mich. 207, 212, 213; *Koopman* v. *Blodgett*, 70 Mich. 610, 616; *Goodin's Ex'rs*

contrary. An apparent but not a real exception is the New York case of *Canal Appraisers* v. *People ex rel. Tibbits* (1836), 17 Wend. 571, where the decision was rested (pp. 609, 612, 624) upon the ground that the bed of the Mohawk River was the property of the State; the authority of the case having been limited accordingly by later decisions of the court of last resort of that State. *Commissioners of Canal Fund* v. *Kempshall*, 26 Wend. 404, 416; *Child* v. *Starr*, 4 Hill, 369, 372; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 44, 63; *Smith* v. *City of Rochester*, 92 N. Y. 463, 482; *Fulton L. H. & P. Co.* v. *State*, 200 N. Y. 400, 413.

Many state courts, including the Court of Appeals of Kentucky, have held, also, that the legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation. *Morgan* v. *King*, 18 Barb. 277, 284; 35 N. Y. 454, 459, 461; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 185; *Murray* v. *Preston*, 106 Kentucky, 561, 563; *Stuart* v. *Clark's Lessee*, 32 Tennessee, (2 Swan) 9, 17; *Walker & Fulton* v. *Board of Public Works*, 16 Ohio, 540, 544; *Olive* v. *State*, 86 Alabama, 88, 92; *People* v. *Elk River M. & L. Co.*, 107 California, 221, 224. And see *Thunder Bay River Booming Co.* v. *Speechly*, 31 Michigan, 336, 345; *Koopman* v. *Blodgett*, 70 Michigan, 610, 616.

This court has followed the same line of distinction.

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v. *Kentucky Lumber Co.*, 90 Ky. 625, 627; *Murray* v. *Preston*, 106 Ky. 561, 565; *Banks* v. *Frazier*, 111 Ky. 909, 912; *Morgan* v. *King*, 35 N. Y. 454, 459; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 185; *Ten Eyck* v. *Town of Warwick*, 82 N. Y. Sup. Ct. (75 Hun) 562, 566; *Weise* v. *Smith*, 3 Ore. 445, 449; *Goodwill* v. *Police Jury*, 38 La. Ann. 752, 755; *Smith & Hambrick* v. *Fonda*, 64 Miss. 551, 554; *East Hoquiam Boom Co.* v. *Neeson*, 20 Wash. 142, 146; *Stuart* v. *Clark's Lessee*, 32 Tenn. (2 Swan) 9, 16; *Irwin* v. *Brown*, 3 Tenn. Cas. 309; *Webster* v. *Harris*, 111 Tenn. 668, 677; *Little Rock, Mississippi River & Texas R. R. Co.* v. *Brooks*, 39 Ark. 403, 409.

That the test of navigability in fact should be applied to streams in their natural condition was in effect held in *The Daniel Ball*, 10 Wall. 557, a case which turned upon the question whether Grand River, in the State of Michigan, was one of the "navigable waters of the United States" within the meaning of acts of Congress that regulated vessels carrying merchandise and passengers upon such waters. Mr. Justice Field, speaking for the court, after showing that the tidal test was not applicable in this country, said (p. 563): "A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, *in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The point was set forth more clearly in *The Montello*, 20 Wall. 430, where the question was whether Fox River, in the State of Wisconsin, was a navigable water of the United States within the meaning of the acts of Congress. There were rapids and falls in the river, but the obstructions caused by them had been removed by artificial means so as to furnish uninterrupted water communication for steam vessels of considerable capacity. It was argued (p. 440) that although the river might now be considered a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore was not navigable water of the United States within the purview of *The Daniel Ball* decision. The court, accepting navigability in the natural state of the river as the proper test, proceeded to show that, even before the improvements resulting in an unbroken navigation were undertaken, a large and successful interstate commerce had been carried on through this river by means of Durham boats,

which were vessels from 70 to 100 feet in length, with 12 feet beam, and drawing when loaded from 2 to 2½ feet of water. The court, by Mr. Justice Davis, declared (p. 441) that it would be a narrow rule to hold that, in this country, unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable *in its natural state* of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." And again (p. 443): "There are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but *the vital and essential point is whether the natural navigation of the river* is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars." Numerous decisions of state courts were cited as supporting this view, including some of those to which we have referred.

Pumpelly v. *Green Bay Company*, 13 Wall. 166, involved the right to compensation for land overflowed with backwater from a dam erected and maintained in the Fox River, under authority of the State of Wisconsin, for the improvement of navigation. (A permissible exercise of state power, in the absence of action by Congress, although it was an interstate navigable water; *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245, 251; *Gilman* v. *Philadelphia*, 3 Wall. 713.) The raising of the river above

its natural stage, by means of an artificial structure, was the *gravamen* of the complaint. It was argued (p. 174) that the State might, in the interest of the public, "erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements." This court overruled the contention, and held there was a taking without compensation contrary to the applicable provision of the constitution of Wisconsin.

In *United States* v. *Lynah*, 188 U. S. 445, the same principle was applied in the case of an operation by the Government of the United States. For the improvement of the navigation of the Savannah River certain dams and other obstructions were placed and maintained in its bed, with the result of raising the water above its natural height and backing it up against plaintiffs' embankment upon the river and interfering with the drainage of their plantation. This was held (pp. 465, 471) to be a taking of private property, requiring compensation under the Fifth Amendment, notwithstanding the work was done by the Government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property thereby flowed.

In several other cases, the limitation of the public right to the natural state of the stream has been recognized. *Packer* v. *Bird*, 137 U. S. 661, 667; *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 698; *Leovy* v. *United States*, 177 U. S. 621, 631.

It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as in their ordinary and natural

condition are navigable in fact, and confined to the natural condition of the stream. And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the Government in the Cumberland and Kentucky Rivers, respectively, are for raising the level of those streams along certain stretches by means of backwater, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the Government has "canalized" the rivers. We intimate no doubt of the power of the United States to carry out this kind of improvement. Nor do we doubt that, upon the completion of the improvements, these rivers: the Cumberland because it is an avenue of communication between two States; the Kentucky and also the Cumberland because in connection with the Ohio and Mississippi Rivers they furnish highways of commerce among many States (*Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *The Daniel Ball*, 10 Wall. 557, 563; *South Carolina* v. *Georgia*, 93 U. S. 4, 10); remained navigable waters of the United States for all purposes of federal jurisdiction and regulation, notwithstanding the artificial character of the improvements. *Ex parte Boyer*, 109 U. S. 629, 632; *The Robert W. Parsons*, 191 U. S. 17, 28.

But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective

defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams.

These cases have no proper relation to cases such as *Gibson* v. *United States*, 166 U. S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton* v. *Wheeler*, 179 U. S. 141, 153, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford* v. *United States*, 192 U. S. 217, 225, where the damage to claimant's land resulted from operations conducted by the Government six miles farther up the river; *Jackson* v. *United States*, 230 U. S. 1, 23, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees designed to prevent crevasses, retain the water in the river, and thus improve the navigation. In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground.

(2.) It is contended, in No. 84, that the damage to Cress' land by the overflow of six and six-tenths acres, because it depreciated its value only to the extent of one-half, does not measure up to a taking, but is only a "partial injury," for which the Government is not liable. The findings, however, render it plain that this is not a case of temporary flooding or of consequential injury, but a permanent condition, resulting from the erection of the lock and dam, by which the land is "subject to frequent overflows of water from the river." That overflowing

lands by permanent back-water is a direct invasion, amounting to a taking, is settled by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177; *United States* v. *Lynah*, 188 U. S. 445, 468–470. It is true that in the *Pumpelly Case* there was an almost complete destruction, and in the *Lynah Case* a complete destruction, of the value of the lands, while in the present case the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. As the court said, speaking by Mr. Justice Brewer, in *United States* v. *Lynah*, 188 U. S. 445, 470: "Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the owner." There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent

domain. Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require (*United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *United States* v. *Lynah*, 188 U. S. 445, 465), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; and where, as in this case with respect to the six and six-tenths acres, land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner, subject to an easement in the United States to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation.

(3.) In No. 84 some question is made about the allowance for the damage to the land by the destruction of the ford across Whiteoak Creek and the pass-way, but we deem the objection unsubstantial. It is said there is nothing to show how Cress acquired ownership of the ford, and that it does not appear that he had a right to pass over the adjoining land of one Brown. It seems to us, however, that the findings, while meager, sufficiently import that Cress had a right to a private way and ford as appurtenant to his land, and that the damage to the land by the destruction of the ford was $500. This brings the case squarely within *United States* v. *Welch*, 217 U. S. 333, 339, and *United States* v. *Grizzard*, 219 U. S. 180, 184, 185.

(4.) In No. 718 there is a contention that, because the back-water is confined to Miller's Creek, it does not

amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the mill dam that was essential to the value of the mill; or, as the findings put it, "The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill." Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162, 166; *Tyler* v. *Wilkinson*, 4 Mason, 397, Fed. Case No. 14,312, 24 Fed. Cas. 472,474; *Johnson* v. *Jordan*, 2 Metc. 234, 239; *Wadsworth* v. *Tillotson*, 15 Connecticut, 366, 373; *Parker* v. *Griswold*, 17 Connecticut, 288, 299; *Harding* v. *Stamford Water Co.*, 41 Connecticut, 87, 92; *Holsman* v. *Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 343; *Beach* v. *Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65, 73; *Scriver* v. *Smith*, 100 N. Y. 471, 480; *Crook* v. *Hewitt*, 4 Washington, 749, 754; *Rigney* v. *Tacoma Light & Water Co.*, 9 Washington, 576, 583; *Benton* v. *Johncox*, 17 Washington, 277, 281; *Lux* v. *Haggin*, 69 California, 255, 390; *Hargrave* v. *Cook*, 108 California, 72, 77; *Pine* v. *Mayor, etc., of City of New York*, 103 Fed. Rep. 337, 339; 112 Fed. Rep. 98, 103; *Wood* v. *Waud*, 3 Exch. 748, 775; *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282, 299; *Stokoe* v. *Singers*, 8 El. & Bl. 31, 36 (Erle, J.).

(5.) In both cases it is urged that there was error in allowing costs against the Government. Section 24 (20) of the Judicial Code, under which the suits were brought, originated in the provisions of the so-called Tucker Act

of March 3, 1887, c. 359, 24 Stat. 505, and the argument of the Government is that while under § 15 of that act costs were recoverable against the United States, in the District Court as in the Court of Claims, yet that § 297, Jud. Code, repealed all of the Tucker Act with the exception of §§ 4, 5, 6, 7, and 10, which relate to matters of procedure, and that there is no longer any authority of law for allowing costs against the United States in suits brought in the District Court. The fact is that § 297, Jud. Code, besides the clause repealing the Tucker Act with the exceptions mentioned, contains in its final paragraph a repeal of "all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act." Now, not only is the provision of § 2 of the Tucker Act, conferring upon the District Courts concurrent jurisdiction with the Court of Claims over certain claims against the United States, carried into § 24 (20) of the Code, but the provision of § 15 of the Tucker Act for the allowance of costs against the Government is carried in as § 152. It is true that § 24 (20) is a part of Chapter 2 of the Code, entitled "District Courts—Jurisdiction," while § 152 is a part of Chapter 7, entitled "The Court of Claims." But by §§ 294 and 295 it is declared and enacted as follows: "Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest. Sec. 295. The arrangement and classification of the several sections of this Act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed."

From this it is plain that § 152 of the Code applies to suits in the District Courts, as well as to those in the Court of Claims.

Judgments affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.